Supreme Court, U.S.
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No. 06-389

In the
Supreme Court of the United States

RIVERBOAT SERVICES OF INDIANA, INCORPORATED;
RIVERBOAT SERVICES, INCORPORATED, ET AL.,
Petitioners,

v.

MICHAEL P. GAFFNEY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's decision finding that seamen employed on a riverboat casino who appealed a regulatory variance granted by the Coast Guard engaged in conduct protected by the seaman's whistle-blower statute 46 U.S.C. § 2114?

2. Whether the Seventh Circuit's decision finding that two seamen who did not participate in the appeal to the Coast Guard were entitled to whistle-blower protection pursuant to 46 U.S.C. § 2114?

3. Whether the Seventh Circuit erred in ignoring its plain precedent of *Stone v. City of Indianapolis* and *Rogers v. City of Chicago* in ruling on causation for retaliatory discharge where similarly situated employees who did not appeal the Coast Guard's variance were also terminated, and not all the employees who appealed the variance were terminated?

4. Whether the Seventh Circuit erred in employing an abuse of discretion standard when it upheld punitive damage awards of $25,000 to each of the Plaintiffs regardless of the underlying damage award when the Defendants had challenged the excessiveness of the awards?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding is as follows:

Petitioners: Riverboat Services, Inc.; Riverboat Services of Indiana, Inc.; and Thomas Gourguechon.

Defendant/Appellant: Robert Heitmeier

Respondents: Michael P. Gaffney; Thomas Bell; Edward Anderson; Robert Beardon; Thomas Trundy; Thomas Goodridge; Dean Horton; Adam Doncet; Robert Palmer; and Neil Reilly.

RULE 29.6 STATEMENT

Petitioner, Riverboat Services of Indiana, Inc., is a privately owned entity that is wholly owned by Petitioner, Riverboat Services Incorporated. Petitioner, Riverboat Services Incorporated, is a privately owned entity. It has no parent company and there is no publicly held company that owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Riverboat Services, Inc., Riverboat Services of Indiana, Inc., and Thomas Gourguechon respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The ruling of the United States Court of Appeals for the Seventh Circuit dated June 16, 2006 affirming the decision of the District Court is officially reported at 451 F.3d 424 (7th Cir. 2006), and is reproduced at App. A at 1a.

The order of the United States District Court for the Northern District of Indiana dated September 22, 2004, denying the Petitioner's post-trial motion is reproduced at App. B at 87a.

The opinion of the United States District Court for the Northern District of Indiana dated April 29, 2004, entering judgment on behalf of certain Plaintiffs and against Defendants following a bench trial is reproduced at App. D at 98a. The Memorandum of Judgment entered May 4, 2004 is reproduced at App. C at 96a.

JURISDICTION

The order of the United States Court of Appeals sought to be reviewed was entered on June 16, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to

review the order of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is:

46 U.S.C. § 2114:

> An owner, charterer, managing operator, agent, master or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.

STATEMENT

The jurisdiction of the district court was invoked under 28 U.S.C. §1331 (general federal question jurisdiction). The Plaintiffs' federal claim is based upon allegations that Defendants violated a federal whistle-blower statute applicable to seamen. 46 U.S.C. § 2114. The dismissal of the remaining three counts in the Second Amended Complaint was not appealed.

Factual Background

The trial court found that Plaintiffs' conduct in appealing a variance issued by the United States Coast Guard and that the termination of those at will employees – along with termination of employees who had not engaged in the activity – were covered under the seamen's whistle-blower statute, 46 U.S.C. § 2114. The Seventh Circuit affirmed and even

expanded whistle-blower status to Plaintiffs who did not participate in the appeal. By granting whistle-blower status to the Plaintiffs who were not even complaining about any conduct by their employer or informing the Coast Guard of any fact not previously known to it, the Seventh Circuit has expanded whistle-blower status to any communication with a regulatory agency, a result not contemplated by any federal or state whistle-blower statute.

Plaintiffs were employed as seamen on board the M/V Showboat. Prior to the employment of the seamen, Riverboat Services of Indiana, ("RSI"), in August, 1996, requested a variance from Coast Guard regulation which required engineers to hold an "unlimited" license when operating a vessel the size of the M/V Showboat on the Great Lakes. (App A, pp 6a-7a). RSI premised its request on the facts that the vessel was similar in machinery and route as other vessels operated by RSI, and the limited use of the gaming vessel on the Great Lakes. In its request to the Coast Guard, RSI disclosed all relevant regulations regarding the service of limited licensed engineers versus unlimited licensed engineers. After consideration of RSI's request, the Coast Guard granted permission to RSI to employ limited licensed engineers. (App. A p. 7a). Accordingly, RSI's Certificate of Inspection ("COI") included an amendment allowing limited licensed engineers to serve on board the M/V Showboat. The COI was posted in the pilot house. (*Id.*)

After the COI was posted, the plaintiffs, along with six other licensed officers, wrote a Freedom of Information request to the Coast Guard inquiring as to the basis of the variance granted by the Coast Guard to RSI. (App. A pp. 7a-8a). This communication, in August, 1997, was copied to all the seamen's congressional representatives as well as a union representative. (App. A pp. 9a fn. 9). Plaintiffs Horton and

Doncet were signatories to this communication, but did not sign any other communications with the Coast Guard. (App. A pp. 9a). The Coast Guard responded to the request by sending to Mr. Gaffney the correspondence between it and RSI regarding the allowance of limited licensed engineers serving on the M/V Showboat.

After the Coast Guard responded to the request, eight of the Plaintiffs, along with eight other licensed officers, wrote to the Coast Guard requesting an extension of time in which to file an appeal of the Coast Guard's decision. (App. A p. 9a). This correspondence with the Coast Guard, in October, 1997, was the Plaintiffs' method of refuting the reasons for the variance allowing limited licensed engineers to serve on the M/V Showboat. After initially denying the appeal, the Coast Guard continued to process the appeal through internal procedures. In December, 1997, months after the Plaintiffs started their letter writing campaign with the Coast Guard, the Commander of the Ninth District granted the Plaintiffs' "appeal" and requested that the COI previously issued by the Coast Guard be amended to allow only for unlimited licensed engineers.

At all times RSI was in complete conformity with the COI issued by the Coast Guard and all Coast Guard regulations. During the time that the Plaintiffs were communicating with the Coast Guard, the vessel was involved in a union fight between the Seafarer's International Union ("SIU") and Marine Engineers Benevolent Association ("MEBA"). The union fighting involved suspected sabotage and escalated until Keith Wallace, of Showboat, instructed Robert Heitmeier, President of RSI, to fire all the seamen involved in the union activities. Robert Heitmeier, who was not aware of any of the prior communications by the Plaintiffs with the Coast Guard, instructed Thomas Gourguechon, Director of Marine

Operations for RSI, to fire all seamen involved in either union activities or suspected sabotage on board the vessel. (App. A pp.16a-17a).

Thomas Gourguechon fired the Plaintiffs, along with approximately forty other employees who were not signatories to the letters to the Coast Guard. In addition, not all the signatories to the communications with the Coast Guard were terminated. (App. A. p.14a, fn. 12).

Lower Court Proceedings

The lower court determined that all but two of the Plaintiffs, those who only signed the August letter, were terminated in retaliation for protected whistle-blowing activities in the October appeal of the Coast Guard's regulations. The lower court awarded the Plaintiffs damages in the amount of $683,328.88. The Seventh Circuit affirmed, and also found that the two Plaintiffs who were not signatories to the October letter were also terminated for protected whistle-blowing communications and entitled to additional awards of back pay, compensatory damages and punitive damages of $25,000 each. The Seventh Circuit did not apply its causation analysis for circumstantial evidence cases for retaliatory discharge where similarly situated employees were not fired, and other non-involved employees were fired.

The Seventh Circuit's decision has wide ranging ramifications for all whistle-blower statutes, and is in conflict with other Circuits requiring that the employee "blow the whistle" on an employer's conduct, rather than merely disagree with publicly known agency decisions. There are at least 59 federal whistle-blower statutes, and about twenty-two states have enacted whistle-blower statutes that may be affected by the Seventh Circuit's analysis. In addition, the

Seventh Circuit's test of causation is in derogation of its own precedents, and is potentially applicable in all whistle-blower cases.

REASONS FOR GRANTING THE PETITION

I. SEVENTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE WHISTLE-BLOWER STATUTE IS IN CONFLICT WITH OTHER CIRCUITS AND STATE COURT INTERPRETATIONS

The Seventh Circuit has improperly expanded a whistle-blower statute to encompass all communications by employees to any agency regarding actions by third parties, including the agency itself, on matters already of public knowledge. The ruling by the Seventh Circuit abrogates the very purpose of whistle-blower statutes and chills all actions by private employers enforcing their own internal rules when they are admittedly in compliance with all applicable rules and regulations[1]. Indeed, the only conduct which the Seventh Circuit found unlawful was that of the Coast Guard – not the employer.

This Court in *dicta* has stated that "the powerful network of legislative enactments-such as whistle-blower protection laws and labor codes-[are] available to those who seek to expose wrongdoing." *Garcetti v. Ceballos,* 126 S. Ct. 1951,

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[1] The Seventh Circuit ignored the fact that the Plaintiffs knew that M/V Showboat was at all times in conformity with the regulations designating that only unlimited licensed engineers should serve on board the vessel. In addition, the Seventh Circuit ignored the trial testimony of the Plaintiffs that there was never a safety violation on board the vessel.

1962, 74 U.S. 4257 (2006). The classic definition of whistle-blowing is "exposing" a fault to a third party or to the public. *Id.* 126 S.Ct. at 1970, *dissenting opinion of Justice Souter.* This Court has previously recognized that "many, if not most, retaliatory incidents come about as a response to safety complaints that employees register with federal regulatory agencies." *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270, 2281 (1990). Implicit in these decisions is the element that the whistle-blowers actually expose, or at least believe that they are exposing, an action by their employer. *See, e.g., Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis,* 45 S. Tex. L. Rev. 543, 594 (2004) ("Whistleblowing, of course, in order to trigger the public policy tort "exception," must involve an employee discharge or adverse employment relating to a complaint or a reporting of an employer violation of an important "public policy" of the jurisdiction.")

The Seventh Circuit's opinion, however, is directly at odds with cases requiring that the Plaintiff blow the whistle on his employer's conduct. In holding that the Plaintiffs' appeal to the Coast Guard interpreting Coast Guard regulations constituted protected whistle-blowing activities, the Seventh Circuit has left employers without the ability to terminate, or even discipline their at will employee's conduct that does not relate to either safety concerns, violations of law, or their own business. Employers no longer know the boundaries of protected or unprotected conduct. Following the Seventh Circuit's analysis, any communication by a private employee to any agency complaining, or inquiring, about government procedures, or variances to any governmental rule or regulation, would be a protected communication. Clearly, whistle-blower statutes are not to be so broadly construed.

The Seventh Circuit's opinion is in conflict with the Fifth Circuit's interpretation of the same statute, the Federal Circuit's interpretation of the Whistleblower Protection Act,[2] the Third Circuit's interpretation of the whistle-blower provisions of the Clean Air Act,[3] as well as various State Supreme Court's decisions interpreting nearly identical whistle-blower statutes.

In *Garrie v. James L. Gray,* 912 F.2d 808, 810 (5th Cir. 1990) the Court held that the plaintiff's discharge was not in violation of 46 U.S.C. §2114 because the plaintiff "has not reported a safety violation to the Coast Guard." In *Garrie*, the plaintiff had called the Coast Guard and inquired as to whether certain regulations concerning maximum working hours were in effect. The plaintiff then informed his employer that he had contacted the Coast Guard and the Coast Guard had confirmed his understanding that working in excess of twelve hours per day would be in violation of Coast Guard regulations. The plaintiff was subsequently terminated after he refused to work more than twelve hours per day. In finding that the statute did not apply, the Fifth Circuit stated that the plaintiff was merely making an inquiry of the Coast Guard and not filing a complaint or furnishing information so that the Coast Guard could investigate and prosecute a violation. The same was true here, yet the Seventh Circuit found a violation by its expansive and incorrect reading of the statute.

The Seventh Circuit recognized that the purpose of the statute is to "ensure that the United States Coast Guard

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[2] 5 U.S.C. § 2302.

[3] 33 U.S.C. § 1367(a).

receives accurate and timely information about the violation of safety regulations...." However, expanding the scope of the statute to include the Plaintiffs' Freedom of Information Act request, the Plaintiffs' request for an extension of time in which to appeal the Coast Guard's decision, and a subsequent appeal of the Coast Guard's decision, goes way beyond the purpose of the statute to inform the Coast Guard of safety violations. This is especially true where, as here, the Plaintiffs admit that there were no safety violations on board the vessel. Indeed, RSI at the time of the communications by the Plaintiffs, had not employed limited licensed engineers, even though it had the right to do so.

The Seventh Circuit's interpretation of the whistle-blower statute is also contrary to other Circuit Courts interpreting other federal whistle-blower statutes. The Federal Circuit in *Francisco v. Office of Personnel Management,* 295 F.3d 1310 (Fed. Cir. 2002), held that the plaintiff did not enjoy whistle-blower protection where he complained that the Office of Personnel Management violated the civil service laws in its interpretation of public law. As the Federal Circuit held, a "report of publicly known information concerning alleged errors in the adjudicative process did not constitute a protected disclosure within the meaning of the Whistleblower Protection Act of 1989...." 295 F.3d at 1311. Obviously here the Plaintiffs were corresponding with the Coast Guard about a COI posted in the pilot house and which was explicitly authorized by the Coast Guard.

In *Meuwissen v. Dept. of Interior,* 234 F.3d 9 (Fed. Cir. 2000), the Federal Circuit, in interpreting the federal Whistleblower Protection Act, held that the plaintiff did not make a protected disclosure when he published his decision finding that prior administrative law judges' determinations were erroneous. "A disclosure of information that is publicly

known is not a disclosure under the WPA. The purpose of the WPA is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." *Id.* at 13.

The Seventh Circuit's opinion is also at odds with the Third Circuit's analysis of the whistle-blower statute in the Clean Water Act.[4] In *Passaic Valley Sewerage Comm's v. United States Dept. of Labor,* 992 F.2d 474, 478 (3d Cir. 1993), a case relied upon by the Seventh Circuit, the Court stated that the purpose of the whistle-blower provisions were to allow employees to assert "company violations of statutes protecting the environment...." The substantive goal of the statutory scheme is not furthered by extending whistle-blower protection to persons complaining about the regulatory agency's rules, instead of their own employer's conduct.

Circuit Courts construing state whistle-blowing statutes virtually identical to the language in 46 U.S.C § 2114 have held that the purpose of a whistle blower statute is to expose an illegality. The Eighth Circuit in *Hitchcock v. Fedex Ground Package System, Inc.,* 442 F.3d 1104, 1106 (8th Cir. 2006), held that since the plaintiff had "no whistle to blow because she reported to FedEx only what it already knew" there was no violation of the Minnesota Whistleblower Statute[5]. The Sixth Circuit denied Ohio state law whistle-blower protection to a plaintiff who complained to the Nuclear Regulatory Commission. *Kelly v. Lambda Research Inc.,* 89 Fed. Appx. 535 (6th Cir. 2004). In *Kelly* the Third

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[4] 33 U.S.C. §1367(a).

[5] M.S.A. section 181.932.

Circuit found that once the plaintiff was informed by the Commission that there was no safety concern with the alleged issue raised earlier by the plaintiff, any actions by the plaintiff after receiving this information would not constitute whistle-blowing activities. Here, not only did the Coast Guard grant the variance in the first place, it affirmatively informed the Plaintiffs that limited licensed engineers did not pose a safety threat for the vessel. (App. A p. 11a).

The Seventh Circuit's construction of the statute is also at odds with state court decisions regarding liability under whistle-blower statutes. In *Obst v. Microtron, Inc.*, 614 N.W.2d 196 (Minn. 2000) the Minnesota Supreme Court held as a matter of law that the plaintiff's report of his employer's conduct to a third party of a fact openly acknowledged by both his employer and the third party could not constitute a good faith report under the whistle-blower statute because there was no whistle to blow. *Accord, Rothmeier v. Investment Advisers, Inc.*, 556 N.W.2d 590 (Minn. App. 1997), plaintiff's communication with employer of suspected violation not a "report" under the whistle-blower statute because the employer was already aware of the issue.

Clearly, the Coast Guard already knew about its own action here – that is the grant of the variance under its regulations governing licensing for engineers. Plaintiffs did nothing to expose this. Defendants had already done so by its request for the variance at the outset. Whistle-blower status should not be accorded these Plaintiffs.

The Seventh Circuit's expansive interpretation of the seamen's whistle-blower statute to include an appeal of a Coast Guard's decision to grant a variance to a private employer is beyond the intention of Congress in enacting the statute. The Seventh Circuit's decision has wide ranging

ramifications for all whistle-blower statutes, and is in conflict with other Circuits requiring that the employee "blow the whistle" on an employer's conduct, and not on publicly known information.

II. THE SEVENTH CIRCUIT IGNORED ITS OWN PRECEDENT IN DETERMINING CAUSATION FOR RETALIATORY DISCHARGE

The trial court found that the plaintiffs, with the exception of Gaffney, produced only circumstantial evidence of retaliatory discharge. (App. D p. 124a). When only circumstantial evidence exists the Seventh Circuit has held that plaintiffs must demonstrate that only the terminated plaintiffs, and not any similarly situated employee who did not complain, were subjected to the adverse action. *See, Stone v. City of Indianapolis*, 281 F.3d 640 (7th Cir. 2002); *Rogers v. City of Chicago*, 320 F.3d 748, 754-55 (7th Cir. 2003). Here, the evidence was undisputed that not all the signatories to the letters were terminated, and at least forty other "similarly situated" employees who did not communicate with the Coast Guard were terminated at the same time. The Seventh Circuit, however, did not address these facts or its prior decisions in *Stone* and *Rogers*.

The Seventh Circuit's error in failing to address the causal link under the *Rogers* and *Stone* analysis is particularly troubling due to the fact that the Seventh Circuit found Mr. Heitmeier, the President and sole shareholder of RSI, had no knowledge of the Plaintiffs' communications with the Coast Guard. Yet, it was Mr. Heitmeier who instructed Mr.Gourguechon to fire the Plaintiffs. The Seventh Circuit found Mr. Heitmeier could not be liable as a matter of law for retaliatory discharge, but that his subordinate, Mr.

Gourguechon, acting upon instructions from Mr. Heitmeier, was found to be personally liable for retaliatory discharge.

The Seventh Circuit also compounded its error in ignoring the *Rogers* and *Stone* line of cases when it found that two Plaintiffs who were not signatories to the protected communication with the Coast Guard were nonetheless whistle-blowers within the protection of the statute.

III. THE SEVENTH CIRCUIT ERRED IN REFUSING TO CONSIDER *DE NOVO* THE EXCESSIVENESS OF THE PUNITIVE DAMAGE AWARD

The trial court awarded each prevailing Plaintiff punitive damages in the amount of $25,000, despite the fact that the statute only specifically enumerates equitable relief, such as reinstatement, back pay and injunction. Defendants argued before the trial court and the Seventh Circuit that punitive damages were not warranted on the record, were determined without regard to the injury sustained, and were not warranted in the amount awarded. Defendants cited to the guidelines for punitive damages established by this Court in *State Farm Mutual Automobile Insurance Co., v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003), and *BMW of North America v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996), in support of its argument that the punitive damage awards, which for one Plaintiff was 250 times the amount awarded as compensatory damages, were excessive as a matter of law.

The Seventh Circuit, relying on *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001) and *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576 (7th Cir. 1996) held that the standard of review of the excessiveness of the awards was abuse of

discretion. This is directly contradicted by this Court's decision in *Cooper Industries* holding that Courts of Appeals must review a District Court's application of the *Gore* test *de novo*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 14, 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 04-3829, 04-3900

[Decided June 16, 2006]
As Amended, June 26, 2006

MICHAEL P. GAFFNEY, THOMAS BELL, EDWARD ANDERSON, et al.,
Plaintiffs-Appellees, Cross-Appellants,

v.

RIVERBOAT SERVICES OF INDIANA, INCORPORATED, RIVERBOAT SERVICES, INCORPORATED, ROBERT HEITMEIER, et al.,
Defendants-Appellants, Cross-Appellees,

v.

SHOWBOAT MARINA CASINO PARTNERSHIP, SHOWBOAT, INCORPORATED, SHOWBOAT INDIANA, INCORPORATED, et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Indiana, Hammond Division
No. 98 C 10--Andrew P. Rodovich, Magistrate Judge

Before RIPPLE, WOOD and WILLIAMS, Circuit Judges.

OPINION

RIPPLE, *Circuit Judge*. The plaintiffs, who are licensed merchant marine officers,[1] brought this whistleblower action under 46 U.S.C. § 2114 against Showboat Marina Casino Partnership, Showboat, Inc., Showboat Indiana, Inc., Showboat Mardi Gras Casino and *M/V Showboat* (collectively "Showboat"), Riverboat Services, Inc. and Riverboat Services of Indiana, Inc. (collectively "Riverboat"), and Robert Heitmeier and Thomas Gourguechon in their individual capacities. *See* Pub.L. No. 98-557, § 13(a), 98 Stat. 2863 (1984) (current version at 46 U.S.C. § 2114 (2002)).[2] The plaintiffs claim that they were discharged in retaliation for engaging in statutorily protected correspondence with the United States Coast Guard ("Coast Guard") about a change in hiring guidelines on the vessel on which they were employed, the *M/V Showboat*. After a bench trial on the plaintiffs' claims against Riverboat and the individual defendants, the United States District Court for the

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[1] The individual plaintiffs are merchant marine officers Michael Gaffney, Thomas Bell, Edward Anderson, Robert Beardon, Thomas Trundy, Thomas Goodridge, Dean Horton, Adam Doncet, Robert Palmer and Neil Reilly.

[2] Since the events in this case, 46 U.S.C. § 2114 has been amended. Neither party argues that these amendments—which were enacted after this litigation began—apply to the present case. *See* footnote 19, *infra*.

Northern District of Indiana entered judgment in favor of all but two plaintiffs and awarded back pay, expenses and punitive damages. Those defendants now appeal, contending that the district court erred in holding that the plaintiffs established the requisite causation between their correspondence with the Coast Guard and their subsequent terminations. These defendants also submit that the plaintiffs did not prove that they are entitled to whistleblower protection under § 2114: according to the defendants, the plaintiffs did not act in "good faith," did not make a "report[]" to the Coast Guard, and did not have a reasonable belief that a violation of safety laws and regulations had occurred at the time of the correspondence. *Id.* Further, the individual defendants contend that they are not subject to § 2114 liability because they do not qualify as "individual[s] in charge of a vessel." *Id.* The two plaintiffs who did not obtain relief[3] cross-appeal the district court's ruling denying them relief. All ten plaintiffs appeal the denial of attorneys' fees. Finally, Riverboat appeals the district court's judgment granting partial summary judgment to Showboat. Riverboat contends that Showboat was required to obtain insurance for the plaintiffs' claims and, thus, it is entitled to indemnification from Showboat. For the reasons set forth in the following opinion, we affirm in part and reverse in part the judgment of the district court.

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[3] These two plaintiffs are Mr. Horton and Mr. Doncet.

I

BACKGROUND

A. Facts

This appeal involves the claims of ten[4] licensed merchant marine officers, formerly employed as captains, chief engineers, assistant engineers or deck officers on the *M/V Showboat*, a large gaming vessel that carried passengers on excursions on Lake Michigan.[5] They allege that they were terminated in retaliation for reporting the violation of safety regulations to the United States Coast Guard and that their terminations violate 46 U.S.C. § 2114(a).[6] *See* § 13(a), 98

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[4] The eleventh plaintiff, Robert B. "Barry" Wood, was dismissed with prejudice by the district court on July 16, 1999.

[5] Specifically, during the events in this case, Mr. Gaffney and Mr. Reilly were Chief Engineers; Mr. Bell was a Captain; Mr. Anderson, Mr. Beardon and Mr. Horton were Deck Officers; and Mr. Trundy, Mr. Goodridge, Mr. Doncet and Mr. Palmer were Assistant Engineers. All held unlimited licenses for their respective positions.

[6] The plaintiffs' second amended complaint contained four counts: Count I alleged that the defendants violated 46 U.S.C. § 2114. Count II alleged that the defendants violated general maritime law. Count III alleged an in rem action against the *M/V Showboat*. Count IV alleged that the defendants violated Indiana state law by wrongfully terminating the plaintiffs. Count I is the only count at issue on appeal; the other counts previously were dismissed by the district court. *See* R.192 at 19 n.4 (holding that the plaintiffs' state law claims are preempted by federal law); *id.* at 18 (dismissing the plaintiffs' claim based on maritime law as irrelevant and cumulative, given that maritime law recognizes the tort of wrongful

Stat. at 2863. The plaintiffs filed suit in 1998 against Showboat, the registered owner of the *M/V Showboat,* and Riverboat, the operator and manager of the vessel. The plaintiffs also named two individual defendants: Robert Heitmeier, the President, member of the Board of Directors and sole shareholder of both Riverboat Services, Inc. and Riverboat Services of Indiana, Inc.; and Thomas Gourguechon, who during the events in this case was both the Director of Marine Operations for Riverboat and the Director of Project Management for Showboat.

1. The *M/V Showboat*

The *M/V Showboat*, the ship on which the plaintiffs were employed, is one of the largest casino vessels currently operating in the United States; it weighs 2,803 gross tons, is 332-feet long and can carry up to 4,250 passengers and crew at a time. During the period at issue in this litigation, the *M/V Showboat* operated on a daily basis gambling excursions on Lake Michigan that departed from, and returned to, East Chicago, Indiana.

The vessel's operation is governed by a Marine Management Services Agreement (the "Agreement") between Riverboat and Showboat. *See* R.37, Ex.A. This Agreement gives Riverboat the "exclusive right and obligation to manage and operate the marine aspects of the [*M/V Showboat*]." *Id.* § 3.01. Specifically, Riverboat is responsible for ensuring that the vessel's operation complies with applicable state and

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discharge only when a seaman is terminated in contravention of an "important public policy," which, in substance, is the same right recognized by federal statute). These findings have not been challenged on appeal.

federal laws, including United States Coast Guard regulations, *see id.*; employing and training the vessel's crew in a manner consistent with generally accepted standards of the riverboat gaming industry, *see id.* §§ 3.01, 3.02(I); monitoring the qualifications of the vessel's staff, as well as assuring that the maritime staff is properly licensed, *see id.* § 3.02(iv); and the hiring, firing, promotion and supervision of all executive and service employees, *see id.* § 3.04.1. In turn, the Agreement obligates Showboat to obtain insurance and to name Riverboat as the insured party. Section 5.01.1 specifies that Showboat should obtain insurance covering all "acts, omissions and injuries to persons or property" caused by Riverboat or its agents, in the amount of not less than five million dollars. *See id.* § 5.01.1. Section 5.01.01.1 then lists five types of insurance coverage required: worker's compensation insurance; comprehensive general liability insurance for accidents and property damage; full form protection and liability insurance on all vessels and floating equipment; hull and machinery insurance; and collision liability insurance for damage to vessels and floating objects. In addition, the Agreement mandates that Showboat obtain coverage for liabilities arising under the Jones Act. *See id.*

The operation of the *M/V Showboat* also is required to abide by federal statutes and regulations. In pertinent part, applicable Coast Guard regulations provide that a limited engineer license permits a chief or assistant engineer to "serve within any horsepower limitations on vessels of any gross tons on inland waters," but not on vessels of "more than 1600 gross tons in . . . Great Lakes service." 46 C.F.R. § 10.501(b); *see also id.* § 15.915(b)-(d). At 2,803 gross tons, the *M/V Showboat* falls into the latter category. Fearing that the Coast Guard under these regulations would require the *M/V Showboat* to hire exclusively engineers with unlimited licenses, on August 27, 1996, Mr. Heimeier wrote

to Lieutenant Commander Rich Brundrett at the Regional Examination Center of the United States Coast Guard in Toledo, Ohio. *See* R.81, Ex.6. He requested that the Coast Guard amend *M/V Showboat*'s Certificate of Inspection ("COI")[7] to permit the employment of engineers with limited engineer licenses. In support of his request, Mr. Heitmeier submitted that the *M/V Showboat* was similar in terms of installed machinery, route and length of voyage to vessels operated by Riverboat on rivers and inland waters; in short, he contended that, because of its limited use as a sailing vessel, the *M/V Showboat* should not be characterized as a vessel in Great Lakes service and should be permitted to employ engineers with limited licenses. Riverboat's request was granted. The Coast Guard issued the *M/V Showboat*'s first COI in April 1997; it provided that "[a]n individual holding a license as chief engineer limited or assistant engineer limited may serve as chief engineer or assistant engineer respectively." R.34, Ex.1. Shortly thereafter, the COI was posted and the vessel was opened to the public.

2. The Communications with the Coast Guard

Shortly after the amended COI was posted, the plaintiffs initiated contact with the Coast Guard. On August 11, 1997, a group of twelve officers, including six plaintiffs—Messrs. Gaffney, Goodridge, Palmer, Reilly, Horton and Doncet—sent a letter to the Commandant of the Coast Guard,

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[7] A COI is a document issued by the Coast Guard, which certifies that the vessel complies with applicable regulations. It also delineates other necessary conditions for safe operation of the vessel, including the requisite number of officers and their qualifications. *See* 46 U.S.C. § 3307 (requiring "inspection for certification before [a vessel is] put into service"); *id.* § 3309 (setting forth the requisite procedures for issuing a COI).

Admiral Robert E. Kramek. Mr. Gaffney authored this letter and obtained the signatures of the other officers. In the letter, the officers expressed concern that "the relaxation of licensing requirements for the engineers on the M/V Showboat . . . substantially reduces passenger safety by not requiring experienced personnel to crew the vessel." R.34, Ex.2. The plaintiffs concluded the letter by requesting information from the Coast Guard about the amended COI. Mr. Gaffney testified that this letter was sent to obtain clarification about licensing requirements because the COI did not specify "what [the change] actually meant." Tr.I at 113. The Coast Guard responded with two separate letters that, according to Mr. Gaffney, did not answer the plaintiffs' questions about the nature of the licensing relaxation but did provide necessary information about proper appeals procedures. Gaffney Dep., R.81, Ex.7 at 42.

A second letter was sent to the Coast Guard on October 3, 1997, this time signed only by Mr. Gaffney and addressed to Lieutenant Neil Shoemaker. R.34, Ex.3. In this letter, Mr. Gaffney expressed concern that two employees[8] had been fired because of their correspondence with the Coast Guard about the relaxation of licensing requirements. In addition, Mr. Gaffney reiterated his concern that the licensing changes risked "a serious disaster," given the "shear [sic] number of people onboard" and the relationship between licensing and experience. *Id.* Mr. Gaffney also inquired about the "specific qualifications for limited engineers," including the number of years' experience required to obtain the license in question. *Id.*

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[8] These two individuals are not parties to the present litigation, but were signatories to the August 11th letter.

On October 5, 1997, Mr. Gaffney sent follow-up correspondence to Lieutenant Shoemaker. *See* R.34, Ex.4. He reported that one of the assistant engineers with an unlimited license recently had been approved to sit for his limited license for a chief engineer position. Mr. Gaffney expressed concern that allowing "a person with so limited experience" to "sign[] on as Chief Engineer of this vessel is the reason why myself and my fellow officers wrote the initial letter to [Coast Guard] Commandant." *Id.*

The last letter to the Coast Guard, which is the focus of this appeal, is dated October 10, 1997. All of the plaintiffs except Mr. Horton and Mr. Doncet signed this letter, as did eight other individuals not parties to this suit. *See* R.34, Ex.5.[9] In this letter, the plaintiffs requested a thirty-day extension of time to file an appeal challenging the relaxation of licensing requirements granted to the *M/V Showboat*. "Our request," the plaintiffs explained, "is based on the following reasons":

> The lowering of licensing standards for engineering officers aboard the M/V Showboat occurred April 11th, 1997 . . . . It was not publicized until mid June, 1997 . . . . After some preliminary research into the lowered licensing requirements, we wrote the USCG Commandant in an effort to understand the exact reason for relaxing these standards. . . . As a group directly effected [sic] by this decision, we feel that we

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[9] Copies of these letters, as well as individual pleas for assistance in resolving labor disputes with the owners and operators of the *M/V Showboat*, also were sent to various members of Congress. *See* R.64, Ex.Q.

> should have been extended the opportunity to have our thoughts, opinions and concerns heard . . . .
>
> It is our contention that the change in licensing requirement for the engineers on the M/V Showboat Mardi Gras from Unlimited to Limited has served to potentially and substantially compromise safety standards aboard the vessel.
>
> The safety requirements set by the United States Coast Guard are minimum requirements for safe operation of vessels, and the operative word here is minimum. Typically, vessel owners and managers conform only to the bare minimum requirements while viewing additional safety items as an inconvenience or extra cost. The request from Riverboat Services Incorporated (RSI) to lower the license requirement for the engineers is a prime example of this tenet as evidenced by their letter of request. . . . Approval of their request has effectively lowered required experience for engineers to a substandard level.

Id. at 1. The letter also described the training discrepancies between an engineer with a limited license and an engineer with an unlimited license. Further, it set forth the reasons why extensive experience on board a large vessel is an essential qualification of engineers navigating the *M/V Showboat*—the difficulty of maneuvering in shallow waters and around obstacles, the passenger capacity of the vessel and the dangers of wind gusting. Finally, the letter rebutted the claim that engineers with limited licenses generally have sufficient experience to serve on inland vessels such as the *M/V Showboat*.

In a letter dated October 31, 1997, Captain M. W. Brown, the Officer in Charge of Marine Inspection, denied the plaintiffs' appeal. *See* R.34, Ex.8. Captain Brown acknowledged receipt of the October 10th letter, which--although phrased as a request for an extension of time--he classified as an "appeal[]" of the "decision to permit the use of engineers with 'limited' licenses aboard Great Lakes vessels not more than 4,000 gross tons."[10] *Id.* After researching the issue raised in the "appeal," he disagreed that

> the use of limited licensed engineers threatens the safety of M/V SHOWBOAT.
>
> While the service requirements between unlimited and limited engineers are different, limited engineers are still required to have appropriate and relevant experience. The regulations currently permit the use of limited engineers for vessels of any gross tons on inland waters. The SHOWBOAT, due to its extremely short "close in" route, combined with its fair weather operating criteria, is analogous to operation on inland waters. . . .
>
> Accordingly, your appeal is denied, and the SHOWBOAT's existing Certificate of Inspection remains valid.

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[10] Captain Brown misquoted the applicable regulation. 46 C.F.R. § 15.915(b)-(d) prohibits vessels of more than 1,600 gross tons, *not* 4,000 gross tons, in Great Lakes service from employing either chief or assistant engineers with limited licenses. The provision permitting vessels of not more than 4,000 horsepower to employ engineers with limited licenses applies only to designated duty engineers. *See* 46 C.F.R. § 15.915(a)(1).

Id. The signatories to the October 10th letter appealed Captain Brown's decision to the Commander of the Ninth Coast Guard District. *See* R.34, Ex.9. In the appeal, the plaintiffs expressed frustration with Captain Brown's failure to "differentiate between passenger vessels and cargo vessels." *Id.* "We feel," they wrote, "that the highest standards should be required, not wavered, on high capacity passenger vessels such as the M/V Showboat, which carries 4,250 passengers and crew." *Id.* This letter also expressed concern that the relaxation of licensing requirements was a growing trend. In that regard, it noted that the Coast Guard recently had issued an amended COI, endorsing the employment of engineers with limited engineering licenses for a vessel similar in size and function to the *M/V Showboat*.

Captain G. S. Cope, acting at the direction of the Ninth District Commander, granted the plaintiffs' appeal on December 19, 1997. *See* R.34, Ex.10. Captain Cope wrote:

> In reviewing the record of this appeal, I found that the endorsement of the M/V SHOWBOAT's certification of inspection to allow limited engineers, did not comply with 46 CFR 15.915. That regulation authorizes individuals licensed as Chief Engineer (limited) or Assistant Engineer (limited) to serve as Chief or Assistant Engineer on vessels up to 1,600 Gross Tons upon the Great Lakes. Since the M/V SHOWBOAT is greater than 1,600 Gross Tons, an individual holding only a "limited" engineer license could not legally serve as the vessel's Chief or Assistant Engineer.

Id. The Captain directed the Officer in Charge of Marine Inspection at the Coast Guard to remove the endorsement allowing for employment of limited license engineers from the

M/V Showboat's COI. An amended COI was sent to Riverboat on December 31, 1997. It was posted on the vessel on January 5, 1998.

It is undisputed that, by January 5, Mr. Gourguechon had become aware of the plaintiffs' correspondence with the Coast Guard. Mr. Gourguechon testified that, in late October, he found the plaintiffs' October 10th letter to the Coast Guard, which he characterized as merely a "job security letter," in the pilot house. Tr.IV at 47-48. Further, at the end of 1997, Mr. Gaffney had approached Mr. Gourguechon with his concerns about the relaxation of licensing requirements, as well as discussed with him developments in the plaintiffs' October 10th "appeal."[11] Tr.I at 154-57. There is no evidence, however, that--before the complaint was filed on January 13, 1998, to which was attached the relevant Coast Guard correspondence--Mr. Gourguechon had read any of the previous letters or that Mr. Heitmeier had read any of the four letters at all. *See* Gourguechon Test., Tr.IV at 47; Heitmeier Dep., R.81, Ex.2 at 59-60.

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[11] The parties dispute the scope and substance of these conversations. For example, Mr. Gaffney testified that, on January 5, before the amended COI was posted, he informed Mr. Gourguechon that the plaintiffs' appeal to the Coast Guard concerning licensing requirements had been granted. According to Mr. Gaffney, Mr. Gourguechon told him that Mr. Heitmeier and Mr. Wallace, the President and CEO of Showboat's East Chicago operation, "were upset" and that Mr. Gaffney would "tak[e] the heat for [the appeal]." Tr.I at 181. Mr. Gourguechon denies having made these statements, although he admits knowing of the plaintiffs' October 10th letter to the Coast Guard prior to the plaintiffs' terminations. *See* Tr.IV at 47-48.

3. The Plaintiffs' Terminations

On January 6, 1998, Mr. Gaffney received a letter from Mr. Gourguechon, notifying him that his employment as Chief Engineer on the *M/V Showboat* had been terminated, effective immediately. The letter identified the reasons for termination as:

> Unauthorized communication and correspondence with regulatory bodies having jurisdiction over the operation of the vessel. Unauthorized correspondence and the regulators [sic] response has had a material adverse effect on the company's ability to efficiently run it's [sic] business.

R.81, Ex.15. Mr. Gaffney was offered no other explanation, either in writing or verbally, for his termination. According to Mr. Gaffney, upon receiving this letter, he told Mr. Gourguechon, "You can't fire me for that." *Id.*, Ex.7 at 84.

The other nine plaintiffs were fired over the course of the next two-and-a-half weeks.[12] Unlike Mr. Gaffney's

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[12] Messrs. Bell and Beardon both received their termination letters from Mr. Gourguechon on January 6, 1998. *See* R.81, Ex.16-17. Mr. Anderson received his termination letter on January 7, 1998. *See id.*, Ex.18. Mr. Trundy received his termination letter on January 8, 1998. *See id.*, Ex.19. Mr. Goodridge received his termination letter on January 14, *see id.*, Ex.20, and Mr. Horton received his on January 15, *see id.*, Ex.21. Mr. Reilly was notified of his discharge on or about January 21, 1998, although he did not receive a written termination notice. On January 22, Mr. Doncet was terminated. *See id.*, Ex.22. Mr. Palmer was discharged the next day. *See id.*, Ex.23.

termination letter, the letters received by these individuals did not contain reference to Coast Guard correspondence but, instead, gave no reason for their discharges. When confronted by these plaintiffs, Mr. Gourguechon denied that their discharges were in any way related to the Coast Guard correspondence.[13]

Mr. Gourguechon testified that, although he drafted and hand-delivered all but one of the plaintiffs' termination notices, he was acting at the direction of Mr. Heitmeier. *See* Tr.IV at 76-78. Specifically, according to both Mr. Gourguechon and Mr. Heitmeier, in late 1997, Mr. Gourguechon approached Mr. Heitmeier about problems he was having with the plaintiffs' employment on the *M/V Showboat*. *Id.* at 36-38. This conversation focused on the plaintiffs' potential connections to the Marine Engineers' Beneficial Association ("MEBA"), the union responsible for picketing near the vessel that was sometimes violent and often disruptive. They also discussed the plaintiffs' involvement in defective rewiring of the *M/V Showboat*. A number of the

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During this time, approximately forty other individuals, who had not signed any of the letters to the Coast Guard, also had their employment terminated. Additionally, the jobs of a number of other signatories to the October 10th appeal, including Eric James, Steve Habermehl, Duane Hunt and Derek Melanson, were not affected.

[13] For example, Mr. Doncet stated that, after he was told of his termination, he asked Mr. Gourguechon whether it was related to the plaintiffs' correspondence with the Coast Guard. Mr. Gourguechon "did not say anything in response." R.81, Ex.25 at 2. Mr. Trundy testified that Mr. Reilly asked Mr. Gourguechon about his termination in Mr. Trundy's presence, and Mr. Gourguechon responded that "[t]here [was] no reason" for it. Tr.III at 112.

plaintiffs had been assigned to assist in repositioning the gaming machines on the vessel; improper wiring later caused a circuit breaker to blow and was responsible for expensive damage to the vessel. Various Riverboat executives, including Mr. Gourguechon and Mr. Heitmeier, believed that the plaintiffs—in cooperation with MEBA—had sabotaged the ship, and they cite this incident as the cause of the plaintiffs' terminations. *See* Gourguechon Test., Tr.IV at 38-43; Heitmeier Dep., R.81, Ex.2 at 61-63.

According to the defense, after this conversation, Mr. Heitmeier approached Mr. Wallace, the President and CEO of Showboat's East Chicago, Indiana, operations. At this meeting, Mr. Heitmeier informed Mr. Wallace of the plaintiffs' connections to MEBA and the suspected acts of sabotage. Mr. Wallace directed Mr. Heitmeier to terminate the individuals involved. As Mr. Wallace later explained, "[i]f they had anything to do with the union, I wasn't . . . interested in the continued aggravation they were causing." R.81, Ex.3 at 25, 28; *see also* Heitmeier Dep., *id.*, Ex.2 at 62-63. Mr. Heitmeier in turn conveyed these instructions to Mr. Gourguechon, who drafted the termination notices.

B. Procedural History

On January 13, 1998, Messrs. Gaffney, Bell, Beardon, Anderson and Trundy filed suit against Riverboat, Showboat, and Mr. Heitmeier and Mr. Gourguechon in their individual capacities.[14] The First Amended Complaint added Messrs.

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[14] Plaintiffs Bell, Beardon, Anderson and Trundy also filed a complaint with the National Labor Relations Board ("NLRB"), alleging a violation of § 8(a)(1) of the National Labor Relations Act ("NRLA"). The matter was heard by an Administrative Law Judge

Goodridge, Horton and Doncet as plaintiffs; the Second Amended Complaint added Messrs. Palmer and Reilly. The plaintiffs asserted that their terminations violated 46 U.S.C. § 2114, the anti-retaliation statute protecting seamen who report the violation of safety regulations on board a vessel to the Coast Guard. They sought reinstatement with back pay, injunctive relief, compensatory and punitive damages and attorneys' fees.

1. The Counterclaim and Cross-Claim

On December 10, 1998, Showboat filed a cross-claim against the Riverboat defendants, contending that Riverboat was solely responsible for all employment matters on the *M/V Showboat*, including termination of the plaintiffs; therefore, Showboat claimed, Riverboat was required to indemnify Showboat for all litigation expenses and for the cost of settlement. *See* R.37. In turn, on March 1, 1999, Riverboat filed a counterclaim against Showboat, claiming that Showboat was obligated under the terms of their Agreement to insure or indemnify Riverboat for all "acts and omissions" causing injury, including violation of § 2114. *See* R.46. On June 30, 2000, Showboat moved for summary judgment against Riverboat on its cross-claim, as well as on Riverboat's counterclaim. *See* R.68. The district court granted this motion in part and denied it in part. *See* R.99. First, the court found that the Agreement did not obligate Showboat to insure

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("ALJ") on July 26 and 27, 1999. The ALJ found that the defendants had violated the NLRA and ordered back pay and reinstatement. The district court held that these proceedings barred these plaintiffs from pursuing their state law claims in federal court. *See* R.95 at 16 (dismissing Bell, Beardon, Anderson and Trundy's state law claims as "preempted by the September 23, 1999 N.L.R.B. adjudication").

against retaliatory discharge claims. *See id.* at 5-9. Specifically, it held that, although § 5.01.1 of the Agreement speaks broadly of insurance policies for Riverboat's "acts, omissions, and injuries," *see* R.37, Ex.A, this provision is modified by § 5.01.01, which specifies, and thereby limits, the requisite scope of coverage. Under § 5.01.01, Showboat was obligated to obtain insurance policies that included within their scope the following: worker's compensation insurance, comprehensive general liability insurance, full form protection and indemnity insurance on all vessels and floating equipment, hull and machinery insurance and collision liability insurance for damage to vessels. *See* R.99 at 9. However, it was not required to obtain "an *additional,* general 'acts and omissions' policy which would have covered intentional acts," such as violation of § 2114. *See id.* (emphasis in original). Riverboat now appeals this decision.

The district court, however, denied Showboat's motion for summary judgment on its cross-claim against Riverboat. The court held that, although the Agreement provides that

> Riverboat is solely responsible—as between Riverboat and Showboat—for discharging plaintiffs, this does not absolve Showboat as "owner . . . of a vessel" of liability to plaintiffs since plaintiffs have also brought a direct § 2114 claim against Showboat for discrimination, and, construing the evidence in the light most favorable to the non-moving plaintiffs, a directive that plaintiffs be fired could certainly arguably constitute a "manner" of discrimination. Because the court is not prepared on the briefs before it to enter judgment in favor of Showboat on plaintiffs' discrimination claim, Showboat's motion for summary judgment against plaintiffs is DENIED.

Id. at 9-10 (internal citation omitted) (alteration in original).

Showboat has not appealed the district court's denial of summary judgment. Because the parties never sought resolution of the factual issues implicating the disposition of this cross-claim, Showboat's cross-claim against Riverboat is still pending in the district court.

2. The Plaintiffs' Claims Against Showboat

In August 2001, the plaintiffs reached a settlement with Showboat in the form of a loan receipt agreement.[15] Also in August, the district court, pursuant to Federal Rule of Civil Procedure 21, severed the plaintiffs' claims against Showboat from the plaintiffs' claims against the other defendants, in part because Showboat had not consented to the jurisdiction of the magistrate judge. *See* R.168. On December 13, 2004, the district court dismissed the plaintiffs' claims against Showboat with prejudice. *See* R.209.

3. The Plaintiffs' Claims against Riverboat

After the district court denied Riverboat's motion for summary judgment, the plaintiffs' claims against Riverboat were scheduled for a bench trial before a magistrate judge. The trial was held from August 19 to August 22, 2002. All ten plaintiffs testified, as did Mr. Gourguechon. In addition,

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[15] In pertinent part, the loan receipt agreement provides that Showboat shall advance to the plaintiffs an undisclosed sum of money; the plaintiffs are obligated to repay this sum, with interest, from the proceeds of any amount received from a settlement with or final judgment against the other defendants in the case.

the defense offered into evidence the deposition testimony of Mr. Heitmeier.

At trial, the defense argued that the plaintiffs were terminated not because of their correspondence with the Coast Guard, but because of their involvement in disruptive union activity on and near the vessel. According to the defense, although Mr. Gourguechon knew of the plaintiffs' letters to the Coast Guard prior to the initiation of the lawsuit, he viewed the letters as a benign job preservation effort, which did not threaten Riverboat's operations.

In addition, the defense submitted that the plaintiffs were not entitled to § 2114's whistleblower protections. It viewed this statutory protection as narrowly tailored to protect seamen who make a formal complaint to the Coast Guard by reporting an actual violation of safety regulations caused by the captain or master of the vessel and who believe that this violation poses a significant safety hazard. According to the defense, the plaintiffs did not fulfill these requirements because: (a) they subjectively did not believe that the employment of limited license engineers would impair the safety of the vessel; (b) the plaintiffs' belief that Riverboat had committed a violation of safety regulations was unreasonable, given that Riverboat had yet to employ an engineer with a limited license; © the plaintiffs did not file a formal complaint with the Coast Guard; and (d) they were not discriminated against by a "master[] or individual in charge of a vessel." § 13(a), 98 Stat. at 2863.

At the conclusion of the bench trial, each party submitted post-trial briefs. Subsequently, the district court entered an order finding for all but two of the plaintiffs, Mr. Doncet and Mr. Horton. The district court first concluded that eight of the ten plaintiffs, those who had signed the October 10th letter,

had established a causal link between their correspondence with the Coast Guard and their subsequent terminations. Although the court recognized that Riverboat also was concerned with disruptive union activity on and near the vessel, it held that the activity protected by § 2114 need not be the "sole cause of the discharge." R.191 at 24, 27. Instead, relying on both Jones Act and civil rights case law, *see, e.g., Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1063 (5th Cir. 1981), the court held that the seamen only must "affirmatively establish that the employer's decision was motivated in substantial part" by the plaintiffs' protected activities. R.191 at 24 (internal quotation marks omitted).

The district court concluded that Riverboat's decision to terminate the plaintiffs was motivated in substantial part by their correspondence with the Coast Guard. In support, the court cited four pieces of evidence: (1) that Mr. Gaffney's termination letter explicitly cited the communication with the Coast Guard as the cause of termination; (2) that the other plaintiffs were "fired in rapid succession and only days after the Coast Guard informed [Riverboat] that it was rescinding the COI limited endorsement"; (3) that the defendants' justifications for the terminations changed "at each stage of the proceedings"; and (4) that disruptive union activity or sabotage was not cited when the terminations occurred or at the NLRB proceedings as a reason for the plaintiffs' discharges. *Id.* at 27-29. In light of these findings, the district court concluded that there existed both direct and circumstantial evidence that the plaintiffs were terminated because of their report to the Coast Guard.

The court also concluded that the eight prevailing plaintiffs had fulfilled the legal requirements of § 2114. The October 10th letter was a "report," rather than merely a

request for information, and thus was entitled to protection under § 2114. *Id.* at 20. The plaintiffs acted in "good faith" in reporting the violation, which the district court defined as the absence of "an improper purpose." *Id.* at 22. This requirement was satisfied because each plaintiff "generally believed that the lowering of the requirements created a safety hazard onboard the vessel." *Id.* at 2. Mr. Heitmeier and Mr. Gourguechon were both "individuals in charge of a vessel," defined by the district court as a person with responsibility for "hir[ing] and fir[ing] personnel" and for "day-to-day operations of the vessel." *Id.* at 29. Consequently, both defendants could be held liable in their individual capacities for the illegal discharges. And, although Riverboat had not yet hired an engineer with a limited license at the time that the plaintiffs' letters were written, and therefore had not yet committed a violation of safety laws or regulations, the "statute does not specifically state that the alleged safety violation must have been committed by the vessel owner rather than a third party." *Id.* at 16. In fact, according to the court, "it would be unreasonable to hold that the reporting of a perceived violation committed by a third party, like the Coast Guard itself, does not fall within the ambit of the statute," given that its purpose is "to promote safety and to remedy unsafe conditions on a vessel." *Id.* Thus, the Coast Guard, in authorizing the employment of engineers with limited licenses in violation of 46 C.F.R. §§ 10.501 and 15.915, committed a regulatory violation cognizable under § 2114. *Id.* at 22-23.

Nevertheless, because Mr. Horton and Mr. Doncet were not signatories to the October 10th letter and because there was no evidence that the August letter they signed was a "report," the court determined that they had not met their burden of proving causation between activity protected by § 2114 and their subsequent terminations. *Id.* at 21.

The district court awarded the eight prevailing plaintiffs back pay, expenses and punitive damages.[16] It concluded that all three remedies were authorized both by § 2114, which makes available any "appropriate relief," *id.* at 33-34, and by general maritime law, *see id.* at 37-39. The court, however, rejected the plaintiffs' request for attorneys' fees, concluding that, as a general matter, fees are available only when explicitly authorized by statute. *See id.* at 42-43.

After the district court denied Riverboat's post-trial motion to set aside the judgment, Riverboat timely appealed. The plaintiffs subsequently filed a timely notice of cross-appeal, challenging the district court's judgment as it relates to Mr. Horton and Mr. Doncet, as well as the denial of the plaintiffs' request for attorneys' fees.

II

APPELLATE JURISDICTION

We first must resolve the question of whether the district court's decision constituted a final judgment—a prerequisite to exercising jurisdiction over this appeal. *See* 28 U.S.C. § 1291. Showboat contends that, as of October 21, 2004, the date that Riverboat filed its notice of appeal, there were two

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[16] Specifically, the district court awarded damages in the following amounts: Mr. Gaffney: $35,632; Mr. Goodridge: $126,505; Mr. Anderson: $77,060; Mr. Bell: $55,564; Mr. Beardon: $122,046; Mr. Palmer: $127,767; Mr. Trundy: $113,564; and Mr. Reilly: $25,100. *See* R.192. Included in these sums are $25,000 in punitive damages per plaintiff. *Id.*; *see also* R.191 at 40 (finding that punitive relief is appropriate, given that Riverboat "acted willfully and wantonly in its dismissal of each of the plaintiffs").

issues still pending in the district court that deprived its judgment of finality. First, the plaintiffs' claims against Showboat had been settled and severed from the proceedings between the plaintiffs and Riverboat, but not yet dismissed. Second, Showboat's cross-claim against Riverboat, alleging that Riverboat was exclusively responsible for all employment matters on the *M/V Showboat* and seeking reimbursement for the costs of settlement with the plaintiffs, also severed from the case now before us, has not yet been dismissed by the district court.

Upon careful examination of the record, we are confident that the pendency of these two matters does not deprive us of jurisdiction to review the judgment of the district court with respect to the plaintiffs' claims against Riverboat and Riverboat's counterclaim against Showboat for indemnification.

On August 13, 2002, the district court severed the plaintiffs' claims against Showboat from the plaintiffs' claims against Riverboat under Federal Rule of Civil Procedure 21. *See* R.168. At the same time, the district court also severed Showboat's cross-claim against Riverboat from the plaintiffs' claims against Riverboat. *Id.*

As a general matter, Rule 21 severance creates two discrete, independent actions, which then proceed as separate suits for the purpose of finality and appealability. We first adopted this rule in *Hebel v. Ebersole*, 543 F.2d 14 (7th Cir. 1976), when we held that, because the claims resolved by the district court and those remaining in that court had been severed pursuant to Rule 21, that court's judgment was "final and properly appealable." *Id.* at 17. This rule enjoys continued vitality. *See Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1014 n.8 (7th Cir. 2000) ("If the district court severed [the

claims against the successor corporation] under Rule 21, then it created two separate actions, each capable of reaching final judgment and being appealed.").[17]

The district court clearly and unambiguously classified its severance order as one "pursuant to Federal Rule of Civil Procedure 21." R.168 at 1, 7 (holding that, because they are "distinct and separate," it had "broad discretion. . . under

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[17] Almost all of the circuits have adopted this same approach to Rule 21 severance. *See, e.g., Acevedo-Garcia v. Monroig*, 351 F.3d 547, 560 (1st Cir. 2003) (holding that the Rule 21 severance rendered the district court verdict a "final and appealable judgment under 28 U.S.C. § 1291"); *United States ex rel. LaCorte v. Smith Kline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 231 n.3 (3d Cir. 1998) ("A severed claim [under Rule 21] proceeds as a discrete suit and results in its own final judgment from which an appeal may be taken."); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1519 (10th Cir. 1991) ("[W]here certain claims in an action are properly severed under Fed. R. Civ. P. 21, two separate actions result; a district court may transfer one action while retaining jurisdiction over the other."); *United States v. O'Neil*, 709 F.2d 361, 368 (5th Cir. 1983) ("Severance under Rule 21 creates two separate actions or suits where previously there was but one. Where a single claim is severed out of a suit, it proceeds as a discrete, independent action . . . . The presence of unresolved claims in the other action does not of itself implicate Fed.R.Civ.P. 54(b), because that Rule applies only where the unresolved claims are in the same action or suit."); *Spencer, White & Prentis, Inc. v. Pfizer, Inc.*, 498 F.2d 358, 361 (2d Cir. 1974) ("[A]ppeal from a judgment on a validly severed single claim may be timely taken as of right notwithstanding the pendency of the remaining claims or counterclaims . . . ."); *see also* 7 Wright & Miller, *Federal Practice & Procedure* § 1689 (2001) ("Once a claim has been severed [under Rule 21] . . . it proceeds as a discrete unit with its own final judgment, from which an appeal may be taken.").

Rule 21" to sever the plaintiffs' claims against Riverboat from what remained of the plaintiffs' claims against Showboat). Nevertheless, because "the district court cannot by this characterization of its order create a severance under Rule 21 where one did not exist before," *United States v. O'Neil*, 709 F.2d 361, 368 (5th Cir. 1983), we necessarily must examine whether the district court erred in classifying its severance order as a Rule 21 order rather than a severance under Federal Rule of Civil Procedure 42(b).

The distinction between the two rules is jurisdictionally significant: "A separate trial order under Rule 42(b) is interlocutory and non-appealable." *Reinholdson v. Minnesota*, 346 F.3d 847, 850 (8th Cir. 2003). By contrast, "[s]everance under Rule 21 creates two separate actions or suits where previously there was but one. Where a single claim is severed out of a suit, it proceeds as a discrete, independent action, and a court may render a final, appealable judgment in either one of the resulting two actions notwithstanding the continued existence of unresolved claims in the other." *O'Neil*, 709 F.2d at 368.[18] We review the district court's

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[18] Moore's Federal Practice explains the difference between Rule 21 and Rule 42(b) severance as follows:

> Severance under Rule 21 results in separate actions. A single claim that is severed from a multiclaim action "may be . . . proceeded with separately." In other words, the severed claim proceeds as a discrete, independent suit. It and the original case result in their own separate final judgments from which appeals may be taken. If a severed claim is one of multiple claims asserted by a single plaintiff against a single defendant (or vice versa), neither party is severed from the original action. Rather, both parties are involved in two separate actions. In contrast, an order of

decision to sever the plaintiffs' claims against Showboat from their claims against Riverboat under Rule 21, rather than under Rule 42(b), for abuse of discretion. *See Rice*, 209 F.3d at 1016 ("It is within the district court's broad discretion whether to sever a claim under Rule 21."); *Hebel,* 543 F.2d at 17.

The district court did not abuse its discretion in severing the plaintiffs' claims under Rule 21 rather than under Rule 42(b). We have held previously that a district court may sever claims under Rule 21, creating two separate proceedings, so long as the two claims are "discrete and separate." *Rice,* 209 F.3d at 1016. In other words, one claim must be capable of resolution despite the outcome of the other claim. *Id.* By contrast, bifurcation under Rule 42(b) is appropriate where claims are factually interlinked, such that a separate trial may be appropriate, but final resolution of one claim affects the resolution of the other. *See, e.g.*, *Reinholdson*, 346 F.3d at 850 (holding that, because the "trials of [the] individual claims may expose issues of systemic violation that would cause the district court to reconsider its decision to dismiss plaintiffs' claims against the State defendants in their entirety," severance under Rule 21 was inappropriate; instead construing the district court's order as an order for separate

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> separate trials does not result in the filing of separate cases. Instead, it simply leads to two or more separate factual inquiries in the context of a single, properly joined case. No matter how many separate trials the court may order, they remain part of a single case. While judgment on a severed claim is final for purposes of appeal, judgment on a claim tried separately is not an appealable final judgment, unless certified for immediate appeal under Rule 54.

4 Moore's Fed. Practice § 21.06 (2005).

trials under Rule 42(b), such that the individual claims may not be appealed until "a final judgment has been rendered in the entire action").

In *Rice v. Sunrise Express*, 209 F.3d at 1016, we addressed when Rule 21 severance constitutes an abuse of discretion. There, the plaintiff sued Sunrise Express, Inc. for violation of the Family and Medical Leave Act. At a pre-trial conference, the district court raised the concern that Gainey Corporation might be liable as a successor corporation to or as a joint employee of Sunrise. The parties stipulated that Gainey was not the successor corporation and the case proceeded to trial before a magistrate judge. On appeal, Sunrise contended that the order below was not final because Gainey had not consented to the jurisdiction of the magistrate judge. We held that the district court, as indicated by a *nunc pro tunc* order and acting pursuant to Rule 21, previously had severed Gainey from the proceedings. We further found that severing Gainey under Rule 21, as opposed to under the bifurcation procedures set forth in Rule 42(b), did not constitute an abuse of discretion:

> As long as there is a discrete and separate claim, the district court may exercise its discretion and sever it. Here, the district court effectively took Gainey, and the separately pled claim for successor liability against Gainey, out of the suit. . . . Because Gainey did not face primary liability, and, in all likelihood, no liability at all, its presence was not necessary, and, in the view of the district court, its removal significantly simplified the case.

Id.

The same is true here as well. At the time that the district court issued its severance order, the "Showboat defendants [had] indicated to the court that all of the plaintiffs' claims against them ha[d] been settled." R.168 at 2. Showboat's only remaining claim was its indemnification claim against Riverboat. This claim rests on section 3 of Showboat's agreement with Riverboat and claims that Riverboat had the "sole authority" to terminate the plaintiffs. R.37 at 6. If so, Showboat contends, it had no responsibility for the plaintiffs' discharges. By contrast, after severance, the present case involved only the plaintiffs' claims against Riverboat and Riverboat's claim for indemnification against Showboat. Notably, Riverboat's indemnification claim rests on the insurance clause in section 5 of the Agreement and is completely independent, both theoretically and practically, of Showboat's claim against Riverboat.

The issues raised by Showboat's severed cross-claim are also "discrete and separate," *Rice*, 209 F.3d at 1016, of the claims raised by the plaintiffs against Riverboat. The plaintiffs' claims require an analysis of the legal requirements of § 2114, including whether Riverboat officials who were "individual[s] in charge of [the] vessel," § 13(a), 98 Stat. at 2863, were motivated by a retaliatory animus in terminating the plaintiffs. Showboat's claim, by contrast, mandates an analysis of the contractual relationship between Showboat and Riverboat and of whether the actions of Showboat, as an "owner" of the vessel, *id.*, constitute a "manner of discrimination," rendering indemnification improper, R.99 at 9. While the facts underlying these claims overlap, the claims are independent of one another. Riverboat's liability is unaffected by whether Showboat *also* was involved in the decision to discharge the plaintiffs; even if Mr. Wallace of Showboat gave a directive to terminate the plaintiffs or otherwise affected the termination decision, Mr. Gourguechon

of Riverboat also is alleged to have played (and did play) a key role in that decision, making Riverboat liable for retaliatory discharge. Similarly, Showboat could be held liable as an "owner" of the vessel absent a finding that the "individual[s] in charge of [the] vessel" retaliated against the plaintiffs. § 13(a), 98 Stat. at 2863. Because the issues raised by Showboat's claim against Riverboat and those raised by the plaintiffs' claims against Riverboat are easily separable for analysis, the district court did not abuse its discretion in finding that the severance would simplify the proceedings.

In short, while the overall financial exposure of Riverboat or Showboat will be affected by the final outcome of both actions, the claims in each action are clearly independent of each other. *See Rice,* 209 F.3d at 1016 (holding the indemnification claims to be severable under Rule 21 from the primary liability inquiry). The validity of the claims before us does not depend, as a matter of law, on the outcome of the severed claims.

Therefore, by virtue of its Rule 21 order, the district court, in the exercise of its sound discretion, initiated two separate proceedings: (1) the plaintiffs' suit against Riverboat, from which Riverboat's counterclaim against Showboat flows; and (2) the plaintiffs' suit against Showboat, from which Showboat's cross-claim against Riverboat arises. Post-severance, these suits are independent for purposes of appellate jurisdiction. As a result, the plaintiffs' severed claims against Riverboat reached "final decision[]," 28 U.S.C. § 1291, vesting jurisdiction in this court without regard to the disposition of the plaintiffs' claims against Showboat. The same is true of the relationship between the current appeal and Showboat's cross-claim against Riverboat. While the cross-claim is still pending in the district court, it has no impact on our jurisdiction under § 1291: Because the

cross-claim logically stems from the plaintiffs' claims against Showboat, rather than from the plaintiffs' claims against Riverboat, and because these two sets of claims previously were severed, Riverboat's present appeal and the resolution of Showboat's cross-claim can be "proceeded with separately." Fed. R. Civ. P. 21.

III

ANALYSIS

A. Statutory Protection Under 46 U.S.C. § 2114

At the time of the events in this case, 46 U.S.C. § 2114(a) provided that:

> An owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.

§ 13(a), 98 Stat. at 2863.[19] The statute authorizes a seaman to bring an action in an "appropriate [United States] District

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[19] This provision was amended by the Maritime Transportation Security Act of 2002, *see* Pub.L. 107-295, § 428(a), 116 Stat. 2064 (2002), which expanded the protections available to seamen and made available an award of attorneys' fees. These amendments became effective after the events in this case took place, and Congress expressed no clear intent to make the amendments retroactive; neither party asks that these amendments be applied here.

Court" and to seek reinstatement with back pay, as well as "any other appropriate relief." § 13(b), 98 Stat. at 2864.

Section 2114 is intended to facilitate Coast Guard enforcement of maritime regulations by ensuring that the Coast Guard is aware of potential safety violations that could endanger vessels, their passengers and their crew. The statute accomplishes this goal by guaranteeing that, when seamen provide information of dangerous situations to the Coast Guard, they will be free from the "debilitating threat of employment reprisals for publicly asserting company violations" of maritime statutes or regulations. *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (discussing a similar retaliatory discharge provision in the Clean Water Act).

We must decide whether the plaintiffs' correspondence with the Coast Guard qualifies for protection under § 2114 and, if so, whether the plaintiffs were terminated in retaliation for this protected activity. Riverboat submits that the district court erred in concluding that the plaintiffs' correspondence constituted a "report" of a safety violation and in holding that the plaintiffs established that they acted in "good faith" in corresponding with the Coast Guard. We shall address each of these contentions.

1. Whether the Plaintiffs' Correspondence is Protected by the Statute

Riverboat contends that the plaintiffs' correspondence with the Coast Guard is not entitled to statutory protection under § 2114 because it did not constitute a "report." In support of this contention, Riverboat relies upon *Garrie v. James L. Gray, Inc.*, 912 F.2d 808 (5th Cir. 1990). In its view, *Garrie* stands for the proposition that § 2114 requires a *formal*

complaint be made to the Coast Guard. The district court did not accept this argument. First, it noted that, although the plaintiffs' October 10th letter did not "use[] the catchword 'report,'" "it is hard to imagine that Congress would have intended for such specificity," given that "the statute itself does not prescribe the manner in which such a report must be made." R.191 at 21. The district court concluded that the October 10th letter to the Coast Guard satisfied this requirement. In that letter, the plaintiffs did not merely seek information. Rather, they made a specific complaint "about the limited endorsement on the COI and sought its removal: they reported what they believed was a violation of a safety law." *Id.*

Whether a particular form of communication qualifies as a "report" under § 2114 is a question of law that we review de novo. *See Olson v. Risk Mgmt. Alternatives, Inc.*, 366 F.3d 509, 511 (7th Cir. 2004) (holding that we review issues of statutory interpretation de novo). As always, when approaching a question of statutory interpretation, "we begin with the plain wording of the relevant statutory provision[]." *United States v. Vitrano*, 405 F.3d 506, 509 (7th Cir. 2005).

When read in isolation, the term "report" arguably could have more than one meaning.[20] However, we do not read a word or words of a statute in isolation; rather, we read them in the context in which they appear in the provision. When read in its entirety, the purpose of § 2114 is quite clear. Its

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[20] One legal dictionary defines the term "report" as an "official or formal statement." *Black's Law Dictionary* 1464 (4th ed. 1968). Other sources, however, indicate that the definition of "report" is more broad, including a detailed account not limited by its purpose, content or form. *American Heritage Dictionary of the English Language* (4th ed. 2000).

import is to ensure that the United States Coast Guard receives accurate and timely information about the violation of safety regulations so that it in turn may fulfill its statutory obligations to keep vessels and those who voyage in them safe and to keep the lanes of maritime transportation free from hazards and impediments. From the Coast Guard's perspective, being "always prepared"[21] requires timely and accurate information. In this context, we cannot attribute to Congress the intent to give the term "report" a narrow or formal meaning. Seamen are not professional report writers; they staff ships and have the skills necessary to their appointed role on the crew and to ensure the vessel's safe and efficient passage. The obvious point of the term "report" in § 2114, plainly and fairly read, is to require that the crew member's message to the Coast Guard addresses a safety violation and contains sufficient detail to apprise the Coast Guard of the nature of the alleged violation. To require any further formality would narrow the statute in a manner that Congress clearly avoided, and, in the process, would frustrate the clear purpose of the provision.

We note that our interpretation of the statutory language comports with the legislative history of the provision. Section 2114 was intended as a response to the Fifth Circuit's

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[21] The motto of the United States Coast Guard is "Semper Paratus"—"Always Prepared." The Coast Guard's mission includes: "(A) Marine safety[;] (B) Search and rescue[;] © Aids to navigation[;] (D) Living marine resources (fisheries law enforcement) [;] (E) Marine environmental protection[;] [and] (F) Ice operations." 6 U.S.C. § 468(a)(1). The Coast Guard also is responsible for assisting in "homeland security missions," which encompasses: "(A) Ports, waterways and coastal security[;] (B) Drug interdiction[;] © Migrant interdiction[;] (D) Defense readiness[;] [and] (E) Other law enforcement." *Id.* § 468(a)(2).

decision in *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983). *See* S. Rep. No. 98-454, at 12 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4831, 4842.*Donovan*, which was decided before seamen were covered by a specific retaliatory discharge provision, involved an engineering officer who corresponded with the Coast Guard in a manner similar to the plaintiffs in this case. He placed a phone call to the Coast Guard to complain about the condition of certain generating equipment on the vessel; after he was demoted, and later terminated, he filed suit under the Occupational Safety and Health Act ("OSHA"), claiming that his discharge was motivated by retaliatory animus. The Fifth Circuit held that OSHA's prohibition against retaliatory discharge of a complaining employee does not apply to seamen. *Donovan*, 720 F.2d at 828-29. Congress signaled its disagreement with the result in *Donovan* by enacting § 2114. It made clear that, although OSHA does not forbid retaliation against seamen, termination for corresponding with the Coast Guard also should be protected by statute. Notably, Congress took this action even though the *Donovan* plaintiff never memorialized his complaint in a formal written statement. This history—coupled with Congress' decision not to define "report" in the statute or in the course of discussing *Donovan* in the relevant legislative history—supports the conclusion that § 2114 does not require a formal complaint, or even a written statement, as a prerequisite to statutory whistleblower protection.[22]

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[22] Moreover, both at the time of the events in this case and in its current form, § 2114 protects a seaman who "has reported or is *about to report*" the violation of safety regulations to the Coast Guard. *Compare* 46 U.S.C. § 2114 (emphasis added), *with* Pub.L. No. 98-557, § 13(a), 98 Stat. 2863 (1984) (current version at 46 U.S.C. § 2114 (2002)). This statutory language suggests that

This conclusion is bolstered by the holding of the only other federal appellate case to address the requirements of § 2114. In *Garrie*, 912 F.2d 808, the plaintiff had placed a phone call to the Coast Guard to discuss his employer's violation of a regulation setting maximum working hours for officers on the vessel. The plaintiff identified himself, but no this employer; he never indicated to the Coast Guard that he wished to file a complaint; and he testified that his main purpose in calling was to "get information about running times" and to "verify his understanding of the applicable rules," rather than to request that the Coast Guard take any particular action. *Id.* at 812 (internal quotation marks omitted). The Fifth Circuit concluded that, because the plaintiff "did [not] reveal the name of his employer or the vessel upon which he was employed--information without which the Coast Guard could not investigate or prosecute a violation"--the communication could not be considered a "report." *Id.* Although Riverboat relies on this case as establishing that § 2114 requires a formal complaint be made by the seaman, we instead believe that *Garrie* held simply that, had sufficient information been conveyed to the Coast Guard, such as the name of the seaman's vessel, his employer and the nature of the safety violation, the communication would have been within the ambit of the statute's protection despite the absence of a formal complaint. So long as the correspondence makes clear that the seaman is reporting a specific regulatory violation with respect to a vessel, the statute protects the reporting crew member.

Therefore, the plaintiffs' October 10th letter clearly qualifies as a "report": It identified the company responsible

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Congress is focused less on the nature, or even the existence, of the report than on the fact that communication was made.

for the alleged regulatory violation, the vessel in question, the plaintiffs' employer, as well as the Coast Guard department that had granted the amended COI. In sum, the letter put the Coast Guard on notice that, in the view of the crew members, the ship was being operated in derogation of applicable regulations. This communication was, in both purpose and effect, just the sort of communication protected by the statute.[23]

2. "Good Faith" Belief

Riverboat further contends that the plaintiffs did not have a "good faith" belief that a violation of safety regulations had occurred when they contacted the Coast Guard, but instead were acting in their own self-interest, primarily motivated by job and wage preservation. The district court rejected this contention; it made factual findings that the plaintiffs

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[23] Riverboat also contends that the October 10th letter was not a "report" because, at the time the letter was received, the Coast Guard already was aware of the licensing changes in *M/V Showboat's* COI. This contention, despite having a superficial appeal, cannot be squared with our obligation to interpret § 2114 in a manner consistent with its evident purpose of promoting compliance with maritime statutes and regulations. The plaintiffs' correspondence with the Coast Guard plainly furthered that goal; there is no evidence that the Ninth District Coast Guard Commander, who ultimately was responsible for revoking the limited endorsement, knew before the plaintiffs informed him that subordinates had granted a waiver of licensing requirements for the *M/V Showboat*. Indeed, so far as this record suggests, it is *because of* the plaintiffs' October 10th appeal that the Coast Guard revoked the endorsement, aligning the employment practices of the *M/V Showboat* with the maritime regulations governing officer licensing. *See* 46 C.F.R. §§ 10.501, 15.915. Therefore, the plaintiffs' October 10th letter properly qualifies as a "report."

genuinely believed that the relaxation of licensing requirements on board the *M/V Showboat* threatened the safety of the vessel and its passengers. "Each of the plaintiffs," the district court explained, "testified that his main concern regarding the COI was that the vessel would be unsafe if limited license engineers were allowed to do the work of unlimited license engineers." R.191 at 8. And, although some of the plaintiffs admitted that they "never told the Captain of the vessel not to take the ship out because it was unsafe," *id.*, the district court concluded that these witnesses were credible with respect to their good faith belief, *id.* at 22.

A district court's findings of fact made after a full bench trial are entitled to great deference and shall not be set aside unless they are clearly erroneous. *See* Fed. R. Civ. P. 52(a); *see also Levenstein v. Salafsky*, 414 F.3d 767, 773 (7th Cir. 2005) (noting that this is a "highly deferential standard"). "A finding of fact is clearly erroneous only when the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Carnes Co. v. Stone Creek Mech., Inc.*, 412 F.3d 845, 847 (7th Cir. 2005). "If there are two permissible views of the evidence, the trial court's choice between them cannot be clearly erroneous." *Id.* This rule holds special force in the context of a district court's assessment of a witness' credibility; "we have stated that a trial court's credibility determination can virtually never amount to clear error." *Id.* at 848 (internal quotation marks omitted).

The record does not justify a conclusion that the district court's factual findings about the plaintiffs' good faith belief are clearly erroneous. The district court heard first-hand the plaintiffs' testimony and assessed the demeanor of those witnesses. After carefully examining the other evidence in the

case, the court concluded that, when making their report to the Coast Guard, the plaintiffs did not have an ulterior motive but instead believed that the relaxation of licensing requirements threatened the safety of the vessel and its passengers. The record contains testimony that supports the conclusion of the district court.[24] We therefore cannot hold that the district court clearly erred in finding that the plaintiffs honestly believed that the change in licensing requirements for the staff of the *M/V Showboat* was in violation of governing safety regulations.

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[24] *See, e.g.*, Horton Test., Tr.II at 65-66 ("[The report to the Coast Guard] was based on our concern for passenger safety. . . . [I]n this case, [the Coast Guard] w[as] actually reducing the minimum requirements, and we were concerned."); Gaffney Test., Tr.I at 119 ("[W]hat they did was they lowered the minimum safety requirements, and we felt that they were in error by reducing the requirements at all. . . . We already thought it was understaffed . . . [i]n the number of officers onboard, and now they're reducing the requirements of what the minimum requirements were to have onboard."); Goodridge Test., Tr.I at 25 ("[W]e were worried about . . . having people there that did not have as much experience as either myself or Bob Gates or the chief engineers there were there [sic] sailing in a chief engineer position."); Anderson Test., Tr.II at 134-35 ("[I signed the October letter because I was worried that] a limited engineer would be allowed on the vessel. . . . [I]t scared me that with two years of sailing experience, I could be a limited chief engineer. And I definitely would not be able to handle a boat like the Showboat."); Bell Test., Tr.II at 194 ("I agreed with the contents of the letter. And basically what the letter was asking for . . . ."); Beardon Test., Tr.II at 273 ("There was a concern for the safety of the passengers, that if engineers with limited experience were able to serve on this vessel, that we may not be able to guarantee the same level of passenger safety as we could with unlimited engineers in the same positions.").

Riverboat responds that the plaintiffs could not have "reasonabl[y]" believed that the employment of engineers with limited licenses posed a "safety issue." Appellants' Br. at 29. However, § 2114 does not require that a seaman believe that there is a "safety hazard" on board a vessel; rather, it requires that the "seamen believe[] that a violation of [U.S. Code Title 46, subtitle II or Coast Guard regulations issued under that subtitle] has occurred." § 13(a), 98 Stat. at 2863. In this case, the plaintiffs reasonably and in good faith believed that the Coast Guard's approval of the *M/V Showboat's* future employment of unlicensed chief and assistant engineers constituted a "violation of . . . a [Coast Guard] regulation. . . ." § 13(a), 98 Stat. at 2863. Coast Guard regulations provide that a chief or assistant engineer with a limited license is permitted to "serve within any horsepower limitations on vessels of any gross tons on inland waters," but not on a vessel of "more than 1600 gross tons in ocean, near coastal or Great Lakes service." 46 C.F.R. § 10.501(b); *see also* 46 C.F.R. § 15.915. Although, as a general matter, the Coast Guard has discretion to "vary the application of inspection standards based on the intended operation of the vessel," *Smith v. United States Coast Guard,* 220 F. Supp. 2d 275, 282 (S.D.N.Y. 2002) (discussing 46 C.F.R. § 176.800(b)), the Coast Guard is bound by a regulation that specifically restricts the exercise of this discretion. *See Frizelle v. Slater*, 324 U.S. App. D.C. 130, 111 F.3d 172, 177 (D.C. Cir. 1997) ("The Coast Guard, like the military departments and agencies in general, is bound to follow its own regulations."). In this case, 46 C.F.R. §§ 10.501 and 15.915 clearly set forth the conditions under which a chief or assistant engineer with a limited license may serve on a vessel, and by contrast, the conditions under which a limited licensed engineer may not serve. In permitting the employment of chief and assistant engineers with limited licenses on board the *M/V Showboat*—a vessel over 1,600

gross tons and in Great Lakes service—the Coast Guard failed to follow these regulations, and acted beyond the scope of its authority. Even if this was not true, the plaintiffs were reasonable in believing that, in issuing the *M/V Showboat's* COI, the Coast Guard acted contrary to the applicable regulations.[25] Therefore, the plaintiffs reporting this violation are entitled to whistleblower protection under § 2114.[26]

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[25] The legislative history of § 2114 indicates that Congress intended that the statute provide protection to a plaintiff who honestly believed that there was a regulatory violation, but who turned out to be incorrect. For example, in *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983)—the factual scenario that § 2114 was enacted to address—the plaintiff had reported to the Coast Guard an alleged defect in generating equipment on the vessel. After inspection, the Coast Guard determined that the equipment was not defective and that the plaintiffs' belief that there was a safety violation on board was incorrect as a factual matter. Nevertheless, according to the legislative history, because the *Donovan* plaintiff honestly believed when making the report that there was a violation of governing safety regulations, he was entitled to whistleblower protection. *See* S. Rep. No. 98-454, at 12 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4831, 4842.

[26] Riverboat also submits that, by issuing the April 1997 amended COI, the Coast Guard "directly informed the plaintiffs . . . that employing limited licensed engineers was not a safety concern." Appellants' Br. at 30. Therefore, according to Riverboat, the plaintiffs could not have believed reasonably that employment of engineers with limited engineering licenses posed a safety hazard. *Id.* However, as discussed in the text, that the plaintiffs believed that the employment of unlicensed engineers was a "safety concern" is not a prerequisite to statutory protection. Instead, the plaintiffs are entitled to whistleblower protection because they reasonably and in good faith believed that the Coast Guard, by granting Riverboat's petition for variance from the licensing

Riverboat, however, responds that the reported violation of a safety regulation must be committed by the employer, rather than by the Coast Guard. Moreover, Riverboat submits that, at the time the plaintiffs' letters were sent to the Coast Guard, neither Showboat nor Riverboat had yet hired an engineer with a limited license, and therefore, they were technically in compliance with their COI, as well as with Coast Guard regulations. *See* 46 C.F.R. §§ 10.501, 15.915. Consequently, according to Riverboat, the plaintiffs "as a matter of law" could not have believed in good faith that a violation of statute or regulation had occurred. Appellants' Br. at 28. By contrast, the plaintiffs submit that § 2114 does not limit its protection to a report of a safety violation committed by their employer; instead, the statute encompasses the report of a violation of safety regulations committed by less senior officers of the Coast Guard. The district court resolved this dispute in favor of the plaintiffs. According to the court, less senior Coast Guard authorities committed a "violation" cognizable under § 2114 when they issued the amended COI under circumstances in which departure from governing regulations was not compatible with the safety of the vessel. Therefore, in reporting this violation, the plaintiffs fell within the ambit of § 2114's protections.

Here, we must ask whether § 2114 protects a seaman who reports a violation committed by a third party such as the Coast Guard upon application of the employer. This is a question of statutory interpretation that we review de novo. *See Schmude v. Sheahan*, 420 F.3d 645, 650 (7th Cir. 2005). As we have noted earlier, when interpreting a statute, we must begin with the plain wording of the provision.

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requirements set forth in 46 C.F.R. §§ 10.501 and 15.915, committed a violation of those regulations.

We hold that the language of the statute makes clear that the reporting of such a violation is covered. Section 2114 provides that a seaman is entitled to protection if he reports that he "believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred." § 13(a), 98 Stat. at 2863. By employing passive language and by not specifying *whose* safety violation must have occurred for a seaman to receive protection under the statute, the statutory language evinces a deliberate choice on Congress' part to protect a seaman who reports a violation by either an employer or a non-employer.[27]

The purpose of § 2114 further supports reading its plain language to protect a seaman who reports a regulatory violation that has the approval of less senior authorities in the Coast Guard. As we have noted earlier, whistleblower

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[27] Riverboat relies upon *Seymore v. Lake Tahoe Cruises, Inc.*, 888 F. Supp. 1029 (E.D. Cal. 1995), for the proposition that § 2114 is not designed to "turn seamen into private enforcers of Coast Guard regulatory decisions." *Id.* at 1033 (quoted in Appellants' Br. at 35). *Seymore*, however, is inapposite. It addressed a narrow factual scenario not at issue in this case. There, the plaintiff had refused a management directive to take the vessel out to sea because of a safety violation; he never made a report to the Coast Guard. The *Seymore* court denied whistleblower protection to the plaintiff. It contrasted § 2114 with § 11© of OSHA, *see* 29 U.S.C. § 660©, which "proscribes retaliatory discrimination . . . because of the exercise by [an] employee on behalf of himself or others of any right afforded by [OSHA]," 888 F. Supp. 2d at 1033 (alteration in original). The court then held that § 2114 does not protect the exercise of rights afforded by law or regulation; instead, it concluded, it "provides only a narrow protection for reporting violations to the Coast Guard." *Id.* at 1034. *Seymore* simply does not discuss the question we now face: *whose* safety violation the complaint to the Coast Guard must report.

protections, such as § 2114, are designed to encourage employees to aid in the enforcement of maritime laws and Coast Guard regulations by making claims through protected channels.[28] This purpose certainly is served by a report of an employer's imminent violation, even when the violation already has the approval of Coast Guard personnel, given that those individuals do not have the last word on enforcement matters.

B. Causation

Now that we have determined that the plaintiffs' correspondence with the Coast Guard is protected under § 2114, we must decide whether the district court correctly determined that the plaintiffs were terminated in retaliation for having sent this correspondence to the Coast Guard.[29]

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[28] *Cf. Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 479 (3d Cir. 1993) (noting, in the context of interpreting retaliatory discharge provisions of the Clean Water Act, that broad whistleblower "protection is necessary to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses" (internal quotation marks omitted)).

[29] We pause here to address Riverboat's contention that the district court erred in not entering judgment in its favor at the close of the plaintiffs' case-in-chief. According to Riverboat, the plaintiffs failed to present a prima facie case of retaliatory discharge, requiring the district court to "direct a verdict" in its favor. Appellants' Br. at 19.

As a preliminary matter, because this is a bench trial, we construe Riverboat's motion as a Rule 52© motion for judgment on partial findings, rather than as a motion for a directed verdict. *See* Fed. R. Civ. P. 52© ("If during a trial without a jury a party has

At the bench trial, the parties presented very different factual scenarios. In the plaintiffs' view, their discharges were the direct result of their communication with the Coast Guard about the staffing of the vessel. The defendants contended, however, that the discharges were due to the plaintiffs' union

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been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue . . . ."). A district court is not *required* to make findings of fact on a Rule 52© motion; the Rule merely "authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence." Fed. R. Civ. P. 52© advisory committee's notes (1991 amendments). "As under the former Rule 41(b), the court retains discretion to enter no judgment prior to the close of the evidence." *Id.* In light of the substantial evidence supporting the court's finding of causation, *see infra*, we cannot conclude that the district court's decision not to rule on the Rule 52© motion was an abuse of discretion.

Riverboat also asserts that, in reviewing the district court's decision, we should evaluate the record at the close of the plaintiffs' case—the time at which the motion was made—rather than the record as a whole. Riverboat's position is not supported by our case law nor by Rule 52©. The defendants can point us to no rule of law that prohibits us, in reviewing the district court's Rule 52© order, from evaluating the record as a whole. *See Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 723-24 (8th Cir. 1978) (holding that, once a defendant introduces evidence on its own behalf, it waives the right to dismissal under Rule 41(b) [now Rule 52©] and stating that "[i]n such situations the sufficiency of the evidence is tested on appeal by viewing the *entire record*," even when "the trial judge reserved ruling on the motion when made" (emphasis added)).

activities and concomitant actions that compromised Riverboat's business success.

The district court resolved this dispute definitively. Sitting as the trier of fact, the court decided that Riverboat's case was simply not worthy of belief. In its order following the submission of post-trial briefs, the court characterized as based on "speculation and conjecture" the testimony of Mr. Gourguechon and of Mr. Heitmeier that the plaintiffs were fired because of their refusal to join a union other than MEBA and because they may have been involved in sabotaging wiring aboard the vessel and causing expensive transformers to blow. R.191 at 27. The court found no specific evidence of sabotage and no evidence that the plaintiffs were involved in the rewiring problems that led to the blown circuit breakers. *Id.* Indeed, the court noted that there was evidence that the wiring had to be done under time constraints—evidence that was quite compatible with the plaintiffs' testimony that the wiring was first replaced temporarily and later brought up to code specifications.[30] *Id.* The district court also found the defendants' testimony on the reasons for the plaintiffs' discharges to be unworthy of belief because, at each stage of the proceedings, the defendants offered a different

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[30] *See, e.g.*, Gaffney Test., Tr.I at 260-62 (explaining that the wires, as temporarily replaced, were not dangerous); Doncet Test., Tr.III at 67 (testifying that the crew was told by Mr. Gourguechon to leave the wires as they were, to be "taken care of later on as things progressed"); Reilly Test., Tr.III at 162 (stating that wiring was not in compliance with governing regulations, but "[i]n the short term, absolutely, it was very safe"; also testifying that the crew's long-term intention was to bring the wiring "up to code").

justification for the firings.[31] The district court believed that this pattern supported the conclusion that the defendants first fired the plaintiffs and then came up with *post hoc* rationalizations for having done so. Management's letter of discharge to Mr. Gaffney, which was drafted the day that the amended COI was posted, specifically stated that the reason for his discharge was his contact with the Coast Guard; there was no reference to union activities or to sabotage. The other plaintiffs were terminated in rapid succession—all within two weeks of the Coast Guard's revocation of the limited endorsement. Although their termination letters did not include the reason for termination set out in Mr. Gaffney's letter, the district court thought the difference was quite explainable because, upon receipt of his letter, Mr. Gaffney had told Mr. Gourguechon that he legally could not be discharged because he had contacted the Coast Guard. *Id.* at 28-29.

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[31] For example, at trial, the defendants posited that the plaintiffs were terminated because of "a pattern of disruptive activity." Gourguechon Test., Tr.IV at 19. The defense also claimed that *all* the plaintiffs were involved in some form or another in the rewiring incident. *See id.* at 38-41 (testifying that each of the plaintiffs were part of, or had "more or less direct responsibility" over, the work crews involved in the incident). However, these rationales directly conflict with those previously relied upon. At the NLRB proceedings, for instance, Mr. Gourguechon explained that Mr. Bell was fired because of his "rough" "bedside manner," R.70 at 64; that Mr. Gaffney was fired for not following the "chain of command," *id.* at 35; that Mr. Trundy and Mr. Doncet were fired to get a "different group of people, different skills" in the engine room, *id.* at 44, 46; and that Mr. Goodridge was fired because it was "time to make a change in the crew," *id.* at 53.

Returning to this issue once again in the course of ruling on the Rule 52 and Rule 59(b) motions, the district court repeated its earlier analysis and then pointedly said that the "defendants' motivation for firing the plaintiffs was because the plaintiffs reported to the Coast Guard that the COI violated safety regulations. This was the sole reason that the defendants fired the plaintiffs, not based on later asserted allegations of sabotage or union activity." R.199 at 8.

When a district court makes findings of fact regarding causation, as it did in this instance, those findings are conclusive and binding upon this court unless they are clearly erroneous. *Jutzi-Johnson v. United States*, 263 F.3d 753, 763 (7th Cir. 2001) (discussing factual findings as to the existence of proximate cause). Although the record does contain evidence that *if* believed by the trier of fact might have led to a different conclusion, the record also contains the evidence relied upon by the district court to reach the conclusions that it did. *See id.* ("[A] district court's choice between two permissible inferences from the evidence cannot be clearly erroneous." (internal quotation marks omitted)). Accordingly, we must accept those findings.

Riverboat urges us to reverse the district court's findings because, even if the Coast Guard correspondence played a marginal role in the termination decisions, the "motivating cause" for terminating the plaintiffs was their union activities. Appellants' Br. at 40. As is made clear by the legislative history, the private right of action made available under § 2114 was modeled after OSHA's retaliatory discharge provision, 29 U.S.C. § 660©. *See* S. Rep. No. 98-454, at 12 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4831, 4842. Under OSHA, in order for a plaintiff to establish that he was terminated in retaliation for filing a health or safety complaint, he must show that the "protected activity was a

substantial reason for the action," although it "need not be the sole consideration behind discharge." 29 C.F.R. § 1977.6(b). In such circumstances, as under § 2114, the ultimate question is whether the discharge or other adverse action would have "taken place 'but for' engagement in protected activity." *Id.*; *see also Dole v. H.M.S. Direct Mail Serv., Inc.*, 752 F. Supp. 573, 580 (W.D.N.Y. 1990) (holding that, although the plaintiff was a "problem employee" and eventually may have been terminated for that reason, the immediate cause of his termination was the OSHA report); *Donovan v. Commercial Sewing, Inc.*, 562 F. Supp. 548, 552-53 (D. Conn. 1982) (concluding that the OSHA complaint was the but-for cause of the plaintiff's termination, given the temporal connection between that complaint and the subsequent termination). In this case, however, a mixed-motive or "but for" analysis is not necessary. The district court specifically found that the defendants did not act from a mixed motive but from a *sole* motive—the plaintiffs' correspondence with the Coast Guard.

The defendants also contend that the district court erred in failing to engage in *McDonnell Douglas*' burden-shifting analysis. As in the case of the OSHA statute, we have no doubt that a defendant can defend against an allegation that he discharged a seaman in retaliation for reporting a matter to the Coast Guard by introducing evidence that the discharge was non-pretextually based on another, legally permissible ground. Indeed, the defendants in this case attempted to avail themselves of just such a defense. However, the findings of the district court that the evidence proffered by the defendants was not worthy of belief simply precludes this defense.

Moreover, the availability of the defense of a non-pretextual reason for discharge does not necessarily make the *McDonnell Douglas* paradigm the appropriate analytical tool for the evaluation of this defense. We have held repeatedly

that the *McDonnell Douglas* burden-shifting method of proof is relevant only before trial, both to determine whether the plaintiff has met her burden of creating a triable issue of material fact and to determine the sequence of presenting evidence at trial. *See Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 767 (7th Cir. 2006) ("The judge on his own initiative gave a *McDonnell Douglas* instruction despite tireless repetition by appellate courts that the burden-shifting formula of that case is not intended for the guidance of jurors; it is intended for the guidance of the judge when asked to resolve a case on summary judgment.").

C. Mr. Doncet and Mr. Horton

The district court entered judgment in favor of all but two plaintiffs—Mr. Doncet and Mr. Horton. It held that there was no evidence that Riverboat executives were aware that these individuals were involved in a report of a violation of safety regulations prior to their terminations. *See* R.191 at 21. The plaintiffs signed only the August letter, not the October 10th letter; according to the district court, there is no evidence that Mr. Gourguechon read the August letter or that the August letter qualified for statutory protection under § 2114 as a "report." Therefore, according to the district court, Mr. Doncet and Mr. Horton did not meet their burden of proving that they were terminated in retaliation for protected correspondence with the Coast Guard. We review this finding of fact for clear error.

Although Mr. Doncet and Mr. Horton did not sign the October 10th "report," the facts of the case compel a finding that the defendants believed them to be involved in protected communications with the Coast Guard. On January 13, 1998, five of the ten plaintiffs filed a complaint in the district court. This complaint, to which were attached the four letters sent to

the Coast Guard during August, September and October of 1997, was served on the *M/V Showboat* on January 14, 1998. The defendants admit having seen and read these attached letters at this time. *See* R.69, Ex.B at 110; Tr.IV at 47. Mr. Doncet and Mr. Horton were terminated shortly thereafter, on January 22 and January 15, 1998, respectively.

As we have noted earlier, the district court found that, although the termination letters delivered to seven of the prevailing plaintiffs did not contain explanations for their discharges, like Mr. Gaffney's letter, the timing and circumstances prove that these plaintiffs also were fired because of correspondence with the Coast Guard. Specifically, these plaintiffs were "fired in rapid succession and only days after the Coast Guard informed [Riverboat] that it was rescinding the COI limited endorsement." R.191 at 28. The "smoking gun"—Mr. Gaffney's termination letter—also demonstrated retaliation against all eight plaintiffs, given that Mr. Gaffney had "testified that he told the defendants, upon receiving his termination letter, that they could not fire him for the reason stated. The[] rapid firings are at least circumstantial evidence that [all of] the plaintiffs were terminated because of their report to the Coast Guard." *Id.* at 28-29.

We cannot see why these findings do not apply with equal force to the terminations of Mr. Doncet and Mr. Horton. As in the case of the other eight plaintiffs, the defendants were aware of Mr. Doncet and Mr. Horton's involvement in the petition to remove the limited endorsement from the *M/V Showboat's* COI. Moreover, the terminations of all ten plaintiffs occurred in "rapid succession," *id.* at 28; the terminations of Mr. Doncet and Mr. Horton occurred within eight days after the defendants learned that they had signed the August letter to the Coast Guard. Given this sequence of

events, we conclude that there is sufficient evidence linking the report to the Coast Guard to the terminations of Mr. Doncet and Mr. Horton. The district court's contrary conclusion is unsupported by the evidence and, therefore, clearly erroneous.

Riverboat maintains that, unlike the eight prevailing plaintiffs, Mr. Doncet and Mr. Horton did not sign the October 10th letter and therefore never submitted a "report" to the Coast Guard. § 13(a), 98 Stat. at 2863. However, given that the letters were served on the *M/V Showboat* simultaneously and Mr. Doncet and Mr. Horton were terminated shortly thereafter, nearly concurrently with the terminations of the other eight plaintiffs, the logical inference is that the defendants believed that Mr. Doncet and Mr. Horton were involved in a broader effort to obtain the revocation of the licensing waiver. Although timing is not dispositive, *see Culver v. Gorman & Co.*, 416 F.3d 540, 546 (7th Cir. 2005) ("We have never said that [temporal proximity] is dispositive in providing or disproving a causal link." (internal quotation marks omitted)), it is a significant factor to be considered, particularly when there is "other evidence that supports the inference of a causal link," *id.* Here, the terminations of Mr. Doncet and Mr. Horton followed closely on the heels of the terminations of the other plaintiffs, which we have held were in retaliation for their protected communication with the Coast Guard. As in justifying the terminations of the other plaintiffs, the defendants offered shifting rationales for terminating Mr. Doncet and Mr. Horton. *Compare* Gourguechon Test., R.70 at 46 (testifying at NLRB proceedings that Mr. Doncet was fired to get a "different group of people, different skills" in the engine room), *with* Gourguechon Test., Tr.IV at 19, 38-41 (testifying at the bench trial that all of the plaintiffs were fired because of their union involvement and concurrent

activities). It is also undisputed that the defendants knew that Mr. Doncet and Mr. Horton were involved in the first inquiry to the Coast Guard, a letter which, although classified as a Freedom of Information Act request, also expressed safety concerns with the relaxation of licensing requirements. *See* R.34, Ex.2 (noting that "the relaxation of licensing requirements for the engineers on the M/V Showboat . . . substantially reduces passenger safety by not requiring experienced personnel to crew the vessel"). This document—while not formally a "report"—put the defendants on notice that Mr. Doncet and Mr. Horton were concerned about, and motivated by, the safety implications of hiring engineers with limited licenses. Moreover, the defendants knew that Mr. Gaffney spearheaded the drafting of all four letters attached to the complaint, making reasonable the conclusion that the signatories to these letters were involved in a general, larger effort to petition the Coast Guard for an amended COI. We conclude, on the basis of these pieces of circumstantial evidence, that Mr. Doncet and Mr. Horton's communication with the Coast Guard and their implicit connection to the October "report" was a motiving factor in their discharges, entitling them to whistleblower protection under § 2114. We therefore reverse the judgment of the district court as it relates to Mr. Doncet and Mr. Horton and remand for further proceedings consistent with this opinion, including the calculation of proper damages with respect to these two plaintiffs.

D. Mr. Heitmeier and Mr. Gourguechon's Liability

1. "Individuals in Charge of a Vessel"

Section 2114, at the time of the events in this case, limited its scope to "owner[s], charterer[s], managing operator[s], agent[s], master[s], [and] individual[s] in charge of a vessel."

§ 13(a), 98 Stat. at 2863. Riverboat's contention that this language does not encompass either Mr. Heitmeier or Mr. Gourguechon is without merit. The plain meaning of the phrase "individual in charge of a vessel" refers to persons who have "control over or responsibility for" the vessel's operation. *American Heritage Dictionary* (4th ed. 2000) (defining the phrase "in charge of"); *see also Black's Law Dictionary* 685 (5th ed. 1979) (defining "in charge of" as "in the care or custody of, or intrusted to the management or direction of"). Mr. Heitmeier, as the President, sole shareholder and member of the Board of Directors of both Riverboat Services, Inc. and Riverboat Services of Indiana, Inc., certainly exercises substantial control over the *M/V Showboat* and its operations; it would be preposterous to suggest otherwise. Similarly, Mr. Gourguechon, as the Director of Marine Operations for Riverboat during the events in this case, was in a position of significant responsibility; among other things, he was in charge of managing the vessel's crew, including making promotion and termination decisions. Indeed, Mr. Gourguechon played a large, if not dispositive, role in the termination decisions in question in this case. Were § 2114 construed so as to not permit the plaintiffs to sue the director of personnel matters—the person actually responsible for the discharges—the statute indeed would be enfeebled. We therefore hold that both Mr. Heitmeier and Mr. Gourguechon qualify as "individual[s] in charge of a vessel" and may be sued in their individual capacities under the terms of § 2114.

2. Mr. Heitmeier's Liability

Riverboat also submits that the district court erred in holding Mr. Heitmeier liable, given that, until after this litigation began, he did not know about the plaintiffs' letters to the Coast Guard. Instead, according to the defendants, Mr.

Heitmeier believed that the plaintiffs were involved in the disruption and miswiring of the vessel and directed Mr. Gourguechon to fire them for this reason. Specifically, the defendants submit that, at the time of the plaintiffs' discharges, Mr. Wallace

> had at least three "run-ins" with the MEBA, and in one instance, members of the union barged into [Mr.] Wallace's East Chicago office and were escorted out by security. [Mr.] Wallace . . . directed [Mr.] Heitmeier to get rid of any employee involved in the union activity because he did not want to deal with the aggravation of the union activity.

R.191 at 9 (summarizing trial testimony). Mr. Heitmeier, in turn, conveyed this request to Mr. Gourguechon, who was solely responsible for drafting the termination letters and delivering these letters to the plaintiffs.

The district court made factual findings that the defendants' proffered reason for terminating the plaintiffs—primarily their union involvement and related activities—was "unconvincing" and "based on speculation and conjecture." *Id.* at 27. As a general rule, we shall defer to such findings unless they are shown to be clearly erroneous; moreover, these findings are compatible with the district court's conclusion that Riverboat fired the plaintiffs in retaliation for their protected communication with the Coast Guard. *See supra*.

Nevertheless, in Mr. Heitmeier's case, the district court's findings, while affording a factual basis for discrediting Mr. Heitmeier's given reasons for terminating the plaintiffs, do not provide a basis for establishing the requisite causation between Mr. Heitmeier's direction that Mr. Gourguechon fire

the plaintiffs and the retaliation for their report of a violation of safety regulations to the Coast Guard. In finding a causal link between the plaintiffs' communications with the Coast Guard and their subsequent terminations, the district court relied heavily upon the "smoking gun" in the case—Mr. Gaffney's termination letter which cited the Coast Guard correspondence. Although the plaintiffs suggest that Mr. Heitmeier retained supervisory responsibility for the drafting of this letter, the record contains no affirmative evidence to support this contention; there is no evidence that Mr. Heitmeier even knew of the letter's contents before it was delivered to Mr. Gaffney. Instead, Mr. Gourguechon testified that he typed that letter and chose its words, including reference to the phrase "unauthorized communication and correspondence with regulatory bodies having jurisdiction over the operation of the vessel." Tr.IV at 113. Moreover, Mr. Gourguechon admitted at trial that he made the ultimate decision to terminate the plaintiffs:

> Q: You made the decision to terminate Mike Gaffney, and only after you made that decision you went to Captain Heitmeier and told him that and he just said okay, go ahead.
>
> A: Yes, that could be correct.
>
> Q: So you did make the decision to terminate Mike Gaffney?
>
> A: Yes.

Id. at 76-77.

Additionally, there is no evidence that Mr. Heitmeier knew of the plaintiffs' letters to the Coast Guard until the

complaint was served on the *M/V Showboat* on January 14, 1998; by that date, Mr. Gaffney, as well as four other plaintiffs, had been fired in retaliation for their protected communications with the Coast Guard. Absent proof that Mr. Heitmeier knew of the plaintiffs' reports of a safety violation on board the *M/V Showboat* prior to the drafting of Mr. Gaffney's termination letter, and, indeed, prior to the termination of five of the ten plaintiffs, there is no support, direct or circumstantial, for the conclusion that Mr. Heitmeier was motivated by this communication in ordering the plaintiffs' terminations.

E. Damages

1. Availability of Compensatory and Punitive Damages

The parties dispute whether the district court erred in awarding the plaintiffs punitive damages, as well as in awarding the plaintiffs expenses incurred in the course of obtaining new employment. Before we address the merits of these issues, we pause to consider whether Riverboat waived the argument that § 2114 permits only equitable relief—limited to reinstatement with back pay—by failing to raise it in a timely fashion. Specifically, Riverboat neglected to make this argument in its post-trial brief; it instead responded for the first time to the plaintiffs' request for compensatory and punitive damages in its Rule 52 Motion for Judgment or, in the Alternative, for Amendment of Judgment Pursuant to Rule 59.

Ordinarily, a challenge to damages not raised until post-judgment motions is deemed waived. *See NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 791 (7th Cir. 2000); *see also Ameritech Info. Sys., Inc. v. Bar Code Res., Inc.*, 331 F.3d

571, 574 (7th Cir. 2003).[32] However, this general waiver principle does not resolve, by itself, the situation before us. Given the very unique procedural history of this case, we must examine and evaluate the record as a totality to determine whether the defendants waived this issue. The plaintiffs first contend that Riverboat should have objected to their request for punitive damages in their proposed jury instructions and that the failure to do so constitutes waiver. However, Riverboat *did* file objections to the plaintiffs' jury instructions, including to the plaintiffs' request for an instruction on punitive damages. *See* R.160 at 6 (objecting to the proposed instruction on damages as "placing undue emphasis on an award of damages, and incorrectly allowing punitive damages and other compensatory damages for violations of general maritime law and statutory violations. Defendants suggest that no instruction be given"). That Riverboat did not further develop this objection is, in all likelihood, attributable to the procedural development of the case. The trial was not sent to a jury but instead was heard by the magistrate judge. Notably, the district court was given a full opportunity to address the merits of Riverboat's position on the availability of compensatory and punitive damages during post-trial proceedings, and the district court, who obviously was far more knowledgeable about the course of

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[32] *Cf. Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) (holding that the defendants waived their objection to the imposition of statutory penalties on the basis of contributory infringement by (a) not raising the objection in their proposed findings of fact and conclusions of law post-trial; and (b) "calculat[ing] statutory damages on the basis of [contributory] infringement[]" in this same filing). Unlike the party in *Los Angeles News*, however, there is no indication that Riverboat assumed the availability of punitive damages in the course of calculating its proposed damages.

proceedings than the cold record allows us to be, considered the possibility of waiver but nevertheless decided to proceed to the merits of the issue. The plaintiffs certainly were given a "meaningful opportunity to respond" to the defendants' challenges in their responses to the defendants' post-trial motions. *Jones-El v. Berge*, 374 F.3d 541, 545 (7th Cir. 2004). Similarly, the district court was given ample opportunity to address the issue. In light of these circumstances, we cannot say that the district court erred in determining that the availability of damages had been preserved adequately.

Therefore, we turn to the merits of Riverboat's challenge to the availability of compensatory and punitive damages. The district court examined the text of 46 U.S.C. § 2114, as well as general maritime law and analogous retaliatory discharge case law, and concluded from these sources that compensatory and punitive damages were available in this case. *See* R.191 at 36-40 (also noting that punitive damages would further the purpose of § 2114 in light of the potential chilling effect that flows from workplace retaliation). As a question of law, we review this conclusion de novo. *Kramer v. Banc of America Sec., LLC*, 355 F.3d 961, 964 (7th Cir. 2004) (reviewing the district court's conclusion that punitive damages were permissible under the governing statute de novo).

At the time of the events in this case, 46 U.S.C. § 2114 provided that, if a seaman is terminated in retaliation for protected correspondence with the Coast Guard, he is entitled to "any appropriate relief, including—(1) restraining violations of this section; and (2) reinstatement to the seaman's former position with back pay." § 13(b), 98 Stat. at 2864. Riverboat contends that the statute does not make available either compensatory or punitive damages, but rather

"limits the plaintiff's [sic] relief to equitable remedies such as reinstatement and back pay." Appellants' Br. at 43.

The plain text of the statute, however, makes clear that the plaintiffs' relief is not so limited. The statute authorizes a federal court to award any and all relief that the court deems appropriate. Equitable remedies, including an injunction and reinstatement, are listed in a demonstrative fashion; such remedies may be awarded, but do not represent the exclusive options available to the court.[33] This conclusion is bolstered by § 2114's legislative history. First, the legislative history describes § 2114 as making available a "legal remedy," *see* S. Rep. No. 98-454, at 12 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4831, 4842, a term of art that—as a historical matter—encompasses and is defined by monetary relief. *See Int'l Fin. Servs. Corp. v. Chromas Techs. Canada, Inc.*, 356 F.3d 731, 736 (7th Cir. 2004) ("Legal remedies traditionally involve money damages."). Second, Congress noted in the legislative history that § 2114 is intended to create a "private right of action similar . . . to that in OSH Act section 11©." S. Rep. No. 98-454. Indeed, Congress employed precisely the same statutory language in § 2114 as it did in OSHA, in both cases making available all "appropriate relief." *Compare* § 13(b), 98 Stat. at 2864, *with* 29 U.S.C. § 660(c)(2). This provision in the OSHA statute has been held to authorize both compensatory and punitive damages. *See Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1191-92 (1st Cir. 1994). Specifically, the First Circuit in *Reich* deemed

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[33] *See also Brown v. Sea-Land Service, Inc.*, 1992 U.S. App. LEXIS 32623, 1992 WL 161045, at *2 (9th Cir. 1992) (holding that it is within the court's discretion to award both reinstatement and punitive damages for violation of § 2114, although finding that the district court's decision not to award such remedies did not constitute an abuse of discretion).

Congress' choice of words, in light of governing Supreme Court precedent, significant. It pointed out that, in *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), the Supreme Court held that, as a general matter and "absent clear direction to the contrary by Congress, the federal courts have the power to award *any appropriate relief* in a cognizable cause of action brought pursuant to a federal statute," including compensatory and punitive damages. *Id.* at 70-71 (emphasis added). In turn, when a statute explicitly makes available "any appropriate relief," referencing the broad power of the federal courts to award both compensatory and punitive damages, we can infer that Congress intended prevailing plaintiffs to recover compensatory and punitive remedies. This is true of § 2114, as it is of OSHA § 11©.[34]

Riverboat, however, submits that by detailing available forms of relief that are equitable in nature—an injunction, reinstatement and back pay—Congress thereby limited the available remedies to those listed in the statute. We cannot accept this argument. Use of the term "including," followed by a list of equitable remedies, "indicates the availability of the named remedies, but does not purport to limit 'all appropriate relief' to those remedies only." *Reich*, 26 F.3d at 1191; *see also Black's Law Dictionary* 687 (5th ed. 1979) ("'Including' within a statute is interpreted as a word of . . . illustrative application"). By choosing to begin with the phrase "any appropriate relief"—rather than merely providing

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[34] *See Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1191 (1st Cir. 1994) ("[A]ll appropriate relief as written in [OSHA] § 11© embraces monetary damages as well as other relevant forms of relief normally available, Congress having provided no clear direction to the contrary." (internal quotation marks omitted)).

that a seaman is entitled to an award "restraining violations of this section; [and] reinstatement to the seaman's former position with backpay," § 13(b), 98 Stat. at 2864—Congress made it clear that it was not presenting an exhaustive list of available remedies.[35] Thus, we read "any appropriate relief"

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[35] Riverboat relies upon two cases for the proposition that "including" serves a limiting function in § 2114, both of which are inapposite. In *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961 (7th Cir. 2004), we addressed a claim of retaliation under the Americans with Disabilities Act ("ADA"). The remedies available under the ADA are those provided by the 1964 Civil Rights Act; that statute makes available "such affirmative action as may be appropriate," including an injunction, reinstatement, back pay or "any other *equitable relief* as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1) (emphasis added). Unlike § 2114, which authorizes "any" appropriate relief, *see* § 13(b), 98 Stat. at 2864, the ADA explicitly restricts the relief available to a prevailing party. Not only does the statute suggest that "affirmative action" consists only of "*equitable* relief," 42 U.S.C. § 2000e-5(g)(1) (emphasis added), but "affirmative action" is an equitable term of art. *See Black's Law Dictionary* 55 (5th ed. 1979) (defining "affirmative action" as action to "make effective the redress of rights").

Riverboat also finds support in *Espinueva v. Garrett*, 895 F.2d 1164 (7th Cir. 1990). There, the plaintiff sought compensatory and punitive damages under both Title VII and the Age Discrimination in Employment Act ("ADEA"). The court held that neither statute authorizes an award of compensatory or punitive damages. *Id.* at 1165. *Espinueva* is also inapposite. First, the remedy for violation of Title VII, like for violation of the ADA, is provided by the 1964 Civil Rights Act. That Act, unlike § 2114, limits available relief to "affirmative action" and other "equitable relief." 42 U.S.C. § 2000e-5(g)(1). Moreover, since the ADEA" adopts the enforcement scheme used in Title VII cases brought by federal employees," *Smith v. Office of Personnel Mgmt.*, 778 F.2d 258, 262

as an umbrella label; in turn, the phrase "including restraining violations . . . and reinstatement" indicates that the umbrella of available remedies encompasses both legal and equitable relief.

2. Calculation of Back Pay Awards

Riverboat also submits that, although the statute explicitly authorizes the district court to award the plaintiffs back pay for lost income, the district court erred in its calculations. Specifically, Riverboat contends that the plaintiffs did not mitigate their damages by immediately seeking re-employment, but instead spent significant amounts of time walking the picket line, taking various classes and traveling after being terminated by Riverboat. Riverboat also submits that the district court failed to calculate carefully the income earned by each plaintiff post-termination.

a. mitigation

The plaintiffs were required to mitigate their damages by using reasonable diligence in seeking employment after their terminations. However, because the lack of mitigation is an affirmative defense, the burden of proof for this issue falls on the employer. *See Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1044 (7th Cir. 1994) (discussing mitigation rules applicable to the calculation of damages under Title VII). The district court found that Riverboat had failed to meet this burden. After four days of testimony at trial detailing with particularity the plaintiffs' post-termination activities, including the specifics of their job search efforts,

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(5th Cir. 1985), the same analysis limits the remedies available for violation of the ADEA.

the district court decided that the plaintiffs had made reasonable efforts to find new employment. The court recognized that various plaintiffs walked the picket line in front of the *M/V Showboat,* R.191 at 30-33, and that some plaintiffs took time off after being terminated to attend various classes, *id.* at 31-32. However, it concluded that the defendants had not proven that the plaintiffs failed to mitigate their damages; instead, the evidence showed that "the plaintiffs walked the picket line for negligible amounts of time," and were "actively seeking employment during that time." *Id.* at 35. We are bound by these findings unless they are clearly erroneous. *See Wichmann v. Board of Trustees*, 180 F.3d 791, 805 (7th Cir. 1999).

The defendants have provided us very little reason to question the district court's findings. For example, Riverboat offers no evidence refuting the testimony that the union was actively looking for employment on behalf of some of the plaintiffs during the weeks and months after their terminations.[36] Nor does Riverboat challenge the district court's finding that the plaintiffs were able to "actively seek[] employment" while also walking the picket line, a finding that is aptly supported by the plaintiffs' testimony.[37] R.191 at 35.

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[36] *See, e.g.*, Goodridge Test., Tr.II at 22. *But see* Anderson Test., Tr.II at 162 (explaining that the MEBA was unable to find him a job).

[37] *See, e.g.*, Gaffney Test., Tr.I at 186 ("I updated my resume and grabbed my phone book and starting sending out resumes and started looking for new work."); Anderson Test., Tr.II at 178 (explaining that, even on days when he walked the picket line, he also was actively searching for a job); Palmer Test., Tr.III at 90 (explaining that, after being terminated, he "made some phone calls" and "got a job").

From this evidence, we conclude that the plaintiffs "demonstrat[ed] a continuing commitment to be a member of the work force" after being discharged by Riverboat.] *Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402, 411 (7th Cir. 1989) (discussing Title VII mitigation requirements).

The same is true of the classes taken by three of the plaintiffs post-termination. Riverboat does not contest the district court's conclusion that compensation for the time spent engaging in alternative activities is appropriate, given that, had the plaintiffs not been discharged, they would have no need to engage in such activities. *Id.* at 34-35. Further, this conclusion is consistent with our case law. *See David v. Caterpillar, Inc.*, 324 F.3d 851, 866 (7th Cir. 2003) (rejecting the argument that the plaintiff's back pay award should be reduced to take into account a term of voluntary educational leave and holding that, had the plaintiff been properly promoted, "she would not have taken the educational leave").

Additionally, even if the defendants' view of the evidence was a legitimate interpretation of the underlying events, we cannot conclude that the district court's finding—that the plaintiffs' efforts to find alternative work were reasonable—is clearly erroneous. *Cf. Kasper v. St. Mary of Nazareth Hosp.*, 135 F.3d 1170, 1176 (7th Cir. 1998) (holding that testimony concerning whether employee failed to mitigate damages is a question of credibility and deferring to jury's assessment of whether or not to believe him).

b. calculation of lost wages

Riverboat also challenges the district court's calculation of the plaintiffs' lost earnings. As in other retaliatory discharge contexts, salary earned after a plaintiff is terminated should be

deducted from the back pay otherwise allowable. *Cf. Donnelly*, 874 F.2d at 411 (discussing calculation of damages under Title VII). In this case, the district court detailed with precision the salaries earned by the plaintiffs after being discharged by Riverboat; the number of work days missed between their terminations and finding new employment; and the income earned, and hours worked, in their new positions in relation to their salaries and hours while employed by Riverboat. *See* R.191 at 30-36. "In reviewing the claim for 'loss of wages,' we note that we are bound by the district court's determination as to the appropriate amount of damages unless that determination is clearly erroneous." *Fleming v. County of Kane,* 898 F.2d 553, 560 (7th Cir. 1990).

To be sure, the testimony of some of the plaintiffs on this issue is slightly vague. For example, Mr. Palmer responded to a question about his income in 1998 with, "Maybe $30,000. I don't know." Tr.III at 91. He then estimated that his income for the next few years was "[p]robably somewhere in the same ball park." *Id.* Nevertheless, Riverboat has failed to offer any evidence that Mr. Palmer's estimate that he earned $30,000 per annum does not reflect accurately his actual income. In calculating lost income, the district court is free to credit the plaintiffs' testimony regarding their sources and level of income. In this respect, the record supports the district court's conclusion that Mr. Palmer earned $30,000 a year in his new position,$20,020 less than his annual salary while employed by Riverboat.

c. reductions to back pay awards

The parties also dispute whether the district court erred in calculating the back pay to which Messrs. Goodridge, Gaffney and Beardon were entitled. Specifically, Riverboat submits that, because these plaintiffs held positions after being

terminated that paid a higher salary than did their positions on board the *M/V Showboat*, their back pay entitlements should have been adjusted downward accordingly.

Riverboat's contention as it relates to Mr. Beardon is without merit. Although Mr. Beardon's annual salary in various positions post-termination was greater than his annual salary at Riverboat, the court properly discounted these earnings to take into account the number of hours worked. Mr. Beardon worked an eight-hour workday at Riverboat, but he worked a twelve-hour workday in both of his new, higher-paying positions. Had he only worked eight hours a day, he would have earned less than he did while employed by Riverboat, warranting back pay.

We next turn to Riverboat's claim concerning the calculation of Mr. Goodridge and Mr. Gaffney's earnings. In all but one of his positions after being terminated by Riverboat, Mr. Goodridge earned less than he would have earned had he remained on *the M/V Showboat*; the only exception is 34 days in 2002, during which he worked for MTL Lines on board a tanker. He was paid $325 per day for this 34-day period, which is $36 per day more than he made while employed by Riverboat. Riverboat contends that the district court erred in failing to subtract this amount, which totals $1,224, from his back pay award. Similarly, Mr. Gaffney lost 14 days of wages looking for work, as well as suffered miscellaneous expenses related to his termination; but, after he obtained new employment, he earned more than he did while employed by Riverboat. Riverboat submits that Mr. Gaffney's higher salary should offset any losses he suffered while unemployed.

In the context of a retaliatory discharge claim under OSHA § 11(c)—a statute which we have already explained is

analogous to § 2114, *see* S. Rep. No. 98-454, at 12 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4831, 4842—the court will award back pay to the plaintiffs "as compensation for income that would have accrued to them had they not been wrongfully dismissed." *Donovan v. Freeway Const. Co.*, 551 F. Supp. 869, 880 (D. R.I. 1982) (holding that the plaintiffs were entitled to the differential between their new and old wages); *see also Martin v. H.M.S. Direct Mail Serv., Inc.*, 936 F.2d 108, 109 (2d Cir. 1991) (holding that the plaintiff was entitled to back pay for the differential between unemployment compensation received and the salary he would have earned if not terminated). In other words, under OSHA, "[t]he award of back pay must be reduced by the amount of any income from employment earned by complainants during the period covered by the back pay award." *Donovan*, 551 F. Supp. at 880; *see also Martin*, 936 F.2d at 109 (subtracting from the back pay award unemployment compensation received). This same rule applies in the analogous context of Title VII. *See, e.g.*, *Chesser v. Illinois*, 895 F.2d 330, 338 (7th Cir. 1990).

The district court, in calculating back pay entitlements, implicitly[38] made a factual determination that the period during which Mr. Goodridge was eligible for back pay—and thus the period in which his earnings should be subtracted from his back pay award—terminated when his employment with MTL Lines began; it therefore awarded back pay for losses suffered up until mid-2002, when Mr. Goodridge took

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[38] The district court did not set forth specifically the period of backpay applicable to each plaintiff. Instead, the court merely agreed with the plaintiffs' back pay calculations and noted that these calculations "have not been challenged by the defendants." R.191 at 36. The final calculations, however, reflect the conclusions discussed in the text.

this position. As for Mr. Gaffney, the district court held that the 14-day period between termination and obtaining new employment was the period in which he was entitled to back pay and calculated equitable relief accordingly. These factual conclusions shall be reversed only if clearly erroneous. *See Matthews v. A-1, Inc.*, 748 F.2d 975, 978-79 (5th Cir. 1984) (reviewing the district court's "refus[al] to deduct [the plaintiff's] earnings at a higher paying position from her damage award" for clear error).

The district court's conclusions are not clearly erroneous, but rather are consistent with the calculation of the period in which a plaintiff is entitled to back pay in a variety of analogous contexts. For example, in the context of Title VII, a plaintiff is eligible for back pay from the date of her injury to the date that she acquires a higher-paying job. *See id.* at 978. The same is true in the context of both OSHA § 11©, *see Donovan v. George Lai Contracting, Ltd.*, 629 F. Supp. 121,122-23 (W.D. Mo. 1985) (awarding back pay for the period between termination and obtaining new employment), and the ADEA, *see Stephens v. C.I.T. Group/Equip. Fin., Inc.*, 955 F.2d 1023, 1029 (5th Cir. 1992); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 (1st Cir. 1982).

Therefore, although Mr. Goodridge and Mr. Gaffney are not entitled to back pay for any period in which they earned the same or more than they would have earned at Riverboat, their "'excess' earnings are not to be subtracted from the back-pay award for the period of unemployment." *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 426 (6th Cir. 1999) (discussing back pay for violation of the ADEA). Indeed, Riverboat has referred us to no case in which the plaintiffs' excess income—earned after the period of time covered by the back pay award—was subtracted from losses suffered during the applicable period of either

unemployment or underemployment. In this light, we conclude that the district court did not err in refusing to subtract from their back pay awards Mr. Goodridge's earnings for the 34 days in which he was employed by MTL Lines and Mr. Gaffney's earnings after he obtained new employment.

3. Calculation of Punitive Damages

The district court, after concluding that the defendants acted willfully and wantonly in discharging the plaintiffs, *see* R.191 at 40, awarded each of the eight prevailing plaintiffs $ 25,000 in punitive damages. Riverboat submits that the district court erred in two respects. First, Riverboat challenges the district court's factual finding that the defendants acted willfully and wantonly in discharging the plaintiffs. According to Riverboat, Mr. Heitmeier did not know about the letters to the Coast Guard and thus did not willfully violate § 2114. Similarly, Mr. Gourguechon viewed the report as a job preservation effort, and instead terminated the plaintiffs because of their pro-union activity. We review the district court's conclusions, which present questions of fact regarding the defendants' state of mind, for clear error. *NRC Corp. v. Amoco Oil Co.*, 205 F.3d 1007, 1014 (7th Cir. 2000).

As discussed above, Mr. Heitmeier is not liable in his individual capacity for violation of § 2114, and, thus, punitive damages with respect to his conduct are inappropriate. The district court, however, did make specific factual findings that Mr. Gourguechon's conduct warranted punitive relief and those findings are entitled to deference in this court. For example, the court found that, after being told by Mr. Gaffney that he could not fire someone for corresponding with the Coast Guard, Mr. Gourguechon did not "reconsider[]

his decision or tak[e] the time to obtain legal advice," but instead "quickly fired the remaining plaintiffs." R.191 at 40. It also found that the fact that Mr. Gourguechon "remove[d] the offending language from the subsequent termination notices" supports the conclusion that he "believed that there was something seriously wrong in terminating [Mr.] Gaffney and the other plaintiffs." *Id.*

The district court's award of punitive damages is not against the weight of the evidence. While there is some contrary evidence in the record-for example, Mr. Gourguechon's willingness to provide various plaintiffs with a letter of recommendation after their terminations--the district court's rationale for awarding punitive damages is aptly supported by the facts of the case. Mr. Gourguechon was aware, as of January 6, 1998, that terminating the plaintiffs in retaliation for communicating with the Coast Guard was unlawful; nevertheless, within the next two weeks, he made the decision to terminate seven other signatories to the October 10th report. In light of this conduct, and in light of other, related justifications for awarding punitive relief in this case, such as the possibility that the "defendants' actions . . . may have a chilling effect on the willingness of other seamen to report a violation," *id.*, we find that the district court did not err in awarding the plaintiffs punitive damages.

Riverboat also submits that, even if the statute authorizes punitive damages, they were not appropriately calculated in this case. Specifically, it contends that the $25,000 awards are excessive, given that the plaintiffs "suffered no long lasting effects of the termination." Appellants' Br. at 48 (internal quotation marks omitted).

A district court's calculation of punitive damage awards is reviewed for abuse of discretion if no constitutional violation is alleged.[39] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). We shall "set aside such an award only if it exceeds an amount necessary to serve the objective of deterrence and punishment." *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 581 (7th Cir. 1996) (internal quotation marks omitted).

We cannot conclude on the basis of this record that the district court abused its discretion in awarding each prevailing plaintiff $25,000 in punitive damages. The district court carefully considered and balanced the competing factors: On the one hand, it noted that the plaintiffs' request for treble damages was "disproportionate to the type of harm suffered here and would result in a windfall for the plaintiffs." R.191 at 40-41. Nevertheless, the court held, the need to "vindicate [the plaintiffs'] rights" made some measure of punitive relief appropriate. *Id.* at 41. As required by our case law, the court also carefully considered the amount "necessary to serve the objective of deterrence and punishment." *Merriweather*, 103

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[39] While Riverboat cites *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), for the proposition that the punitive damages awarded were excessive, both cases are inapplicable. *Gore* and *Campbell* addressed the claim that the punitive damages awarded by a jury were unconstitutionally excessive, in violation of the Due Process Clause of the Fourteenth Amendment. Riverboat has not asserted that the punitive damages calculations in this case were so arbitrary as to violate the Constitution of the United States. Therefore, we review the award only for abuse of discretion.

F.3d at 581. The purpose of punitive relief in the case, the court found, would be to punish the defendants' willful and wanton conduct and to deter others from engaging in similar illegal conduct. This goal is particularly significant in the context of a retaliatory discharge claim, as here, given that the outcome of the case "may have a chilling effect on the willingness of other seamen to report a violation." R.191 at 40. On this basis, the court deemed $25,000 per plaintiff in punitive damages appropriate.

In light of these considerations, the punitive damages awards are within the bounds of reason.[40] *See Merriweather*, 103 F.3d at 582 (upholding the district court's award of punitive damages in similar circumstances). Indeed, this sum is less than the actual damages suffered by most of the plaintiffs, which in all but two circumstances exceed $25,000. We therefore uphold the plaintiffs' award as calculated by the district court.

4. Set-Off

Riverboat submits that the district court also erred in refusing to set-off the total damage award with the amount received by the plaintiffs in settlement with the Showboat defendants. The plaintiffs respond that, pursuant to the district court's denial of the plaintiffs' motion in limine, Riverboat was permitted to introduce this evidence at trial, but failed to

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[40] In light of the broader goals served by the awards of punitive damages in this case, we also cannot accept Riverboat's argument that the district court abused its discretion in awarding the plaintiffs equal sums. Although certain plaintiffs suffered little to no actual harm from their terminations, "each plaintiff suffered the same deprivation of a statutory right," rendering appropriate "[a]n equal amount for each plaintiff." R.191 at 41.

do so; therefore, they have waived the opportunity to object to the calculation of damages on this basis.

In certain contexts, when multiple defendants cause a single injury to the plaintiff, a defendant held liable at trial maybe entitled to have the damages assessed reduced by the amount paid in settlement to the plaintiff by a joint tortfeasor. We need not reach the applicability of this rule today. The plaintiffs filed a pre-trial motion in limine, requesting that the district court preclude the introduction of the plaintiffs' loan receipt agreement with Showboat, which they feared would be used to offset their damages. *See* R.150. At the beginning of the trial, the district court ruled on all pre-trial evidentiary motions. It held, however, that it was unnecessary to decide at that stage of the proceedings whether to grant or deny the motion in limine to preclude admission of evidence on the existence of a loan agreement with Showboat:

> The motion in limine to preclude evidence of the loan agreement, those types of matters go to the measure of damages. Had this been a jury trial, that is something that would have been discussed in any post trial proceedings if the jury had returned a verdict in favor of the plaintiffs. As the trial proceeds, since this is a bench trial, we can worry about that, since that is an issue of damages and the measure of damages, assuming that the plaintiffs prevail.

Tr.I at 5.

As evidenced by this passage, the district court invited Riverboat to renew its arguments at a later time—presumably in the course of seeking admission of evidence substantiating the terms of the plaintiffs' settlement agreement with Showboat. Riverboat failed to take advantage of this

opportunity; it neither moved for admission of documents evidencing the settlement agreement nor discussed the settlement as a mitigating factor at trial. As a result, the record contains no evidence upon which we can conclude that the district court erred in failing to take into account the plaintiffs' settlement with Showboat.

F. Attorneys' Fees

In the plaintiffs' cross-appeal, they submit that the district court erred in refusing to award them reasonable attorneys' fees. They contend that the remedial language of the statute—which makes available "any appropriate relief"—is sufficiently broad as to authorize a federal court to award attorneys' fees under appropriate circumstances. § 13(b), 98 Stat. at 2864. The district court, however, held that absent express statutory authorization to the contrary, a party generally is responsible for their own cost of representation. *See* R.191 at 42. The court explained that, at the time of the events in this case, 46 U.S.C. § 2114 did not contain such authorization and that "[a]llowing the plaintiffs to recover attorney [sic] fees would be similar to allowing them to recover double the punitive damages amount." *Id.* at 42-43.

We follow the "American Rule" with respect to attorneys' fees, which requires "express" statutory authorization of such fees. *Zeigler Coal Co. v. Dir., Office of Workers' Comp. Programs*, 326 F.3d 894, 899 (7th Cir. 2003). "A federal court normally will not order one party in a case to pay another party's attorneys' fees unless Congress has authorized such fee awards by statute." *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 412 (7th Cir. 2005). At the time of the events in this case, Congress had not yet provided for fee-

shifting in § 2114.[41] The plaintiffs, however, respond that the statute makes available all "appropriate relief," which includes in its scope attorneys' fees. This interpretation is inconsistent with our case law, as well as the general American Rule.

The plaintiffs also submit that *Hall v. Cole*, 412 U.S. 1, 5, 93 S. Ct. 1943, 36 L. Ed. 2d 702 (1973), and *Kinslow v. American Postal Workers Union, Chicago Local*, 222 F.3d 269, 279-80 (7th Cir. 2000), provide additional justification for reversing the district court's denial of attorneys' fees. First, they contend that they are entitled to attorneys' fees under the "common benefit" doctrine. This doctrine is an equitable, judicially created exception to the American Rule, which flows from the "common fund" exception.[42] It provides that, although in the absence of a fee-shifting statute plaintiffs are generally not entitled to fees, when a plaintiff's "successful litigation confers a substantial benefit on the members of an ascertainable class," the court may award attorneys' fees. *Hall*, 412 U.S. at 5 (internal quotation marks omitted). This benefit need not be pecuniary; however, the court's jurisdiction over the subject matter must "make[]

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[41] Section 2114 subsequently was amended to make available "an award of costs and reasonable attorney's fees to a prevailing plaintiff not exceeding $1,000." 46 U.S.C. § 2114(b)(3). Neither party argues that the amended provision, which was passed after the litigation in the district court commenced, directly affects the calculation of fees in this case.

[42] *Hall v. Cole*, 412 U.S. 1, 4-5, 93 S. Ct. 1943, 36 L. Ed. 2d 702 (1973) ("[F]ederal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require."); *see also id.* at 5 n.7 (tracing the doctrine's origins to the "common fund" theory).

possible an award that will operate to spread the costs proportionately among [the persons benefitting from the court's ruling]." *Id.* The underlying theory is that to "allow [these individuals] to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich [them] unjustly at the plaintiff's expense." *Id.* at 6.

The common benefit exception is inapplicable to this case. The plaintiffs ask this court to shift their fees to the defendants; the common benefit doctrine, however, serves to shift fees and expenses from the plaintiffs individually to the benefitting class as a whole. To award attorneys' fees under this theory "is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefitted from them." *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396-97, 90 S. Ct. 616, 24 L. Ed. 2d 593 %(1970); *see also id.* at 397 (reimbursing the plaintiffs for attorneys' fees from the corporate treasury, thus spreading the costs across the benefitting shareholders); *Hall*, 412 U.S. at 8-9 (holding that the plaintiffs acted on behalf of all union members, and reimbursing the attorneys' fees from the union treasury, such that all union members in effect equally contributed to the costs of litigation). Moreover, the plaintiffs have not met their burden of proof on this issue: Not only have they failed to identify a readily ascertainable group of persons benefitting from their successful litigation, but they also have failed to suggest a workable strategy for distributing the costs of representation among such persons. *See Brzonkala v. Morrison*, 272 F.3d 688, 692 (4th Cir. 2001) (rejecting the applicability of the common benefit doctrine, given that the plaintiffs did not identify a strategy for "shift[ing] costs with some exactitude to those benefitting" (internal quotation marks omitted)).

Second, the plaintiffs urge us to find attorneys' fees appropriate because the defendants "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Hall*, 412 U.S. at 5 (internal quotation marks omitted). However, the "bad faith" requirement has been interpreted strictly by this court. *See Satoskar v. Indiana Real Estate Comm'n*, 517 F.2d 696, 698 (7th Cir. 1975) ("The standards for bad faith are necessarily stringent."); *see also Singer Co. v. Skil Corp.*, 803 F.2d 336, 341 (7th Cir. 1986) (holding the bad faith rationale inapplicable, given that the defendants acted in good faith in appealing the case and in raising defenses to the plaintiffs' claims). We find no need to liberalize the rule in this case. The district court made conclusive factual findings that the defendants did not "behave[] vexatiously during the course of litigation." R.191 at 43. These findings are binding upon us in the absence of clear error. Given the absence of any evidence that Riverboat did not raise its defenses to the plaintiffs' claims in good faith, and given the plaintiffs' failure to point us to any particularly egregious conduct on Riverboat's part in the course of this litigation, we uphold these findings and, consequently, affirm the district court's denial of attorneys' fees.

G. Riverboat's Counterclaim

On November 16, 2000, the district court granted summary judgment in favor of Showboat on Riverboat's counterclaim. *See* R.99. It held that the Agreement between Showboat and Riverboat does not obligate Showboat to obtain

a general "acts and omissions" policy.[43] *Id.* at 7. "[W]hereas section 5.01.1 spells out Showboat's duty to obtain insurance policies for 'acts, omissions and injuries,'" the court explained, "subsection 5.01.01 (a subsection of 5.01.1) articulates the types of coverages to be included within those policies." *Id.* at 6. Therefore, according to the district court, Showboat is not required to insure against Riverboat's violation of federal employment laws, including 46 U.S.C.

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[43] The indemnification provisions of the Agreement provide:

> 5.01.1 Owner shall obtain insurance, including Jones Act coverage, the minimum amount of not less than Five Million Dollars ($ 5,000,000), for the acts, omissions and injuries to persons or property caused in whole or in part by the Maritime Staff and/or Manager, its agents or employees. . . .
>
> 5.01.01.1 Owner shall procure at its own cost and expense, including the cost of all deductibles, and continuously maintain in force the following insurance coverages:
>
> (a) Worker's Compensation Insurance . . .;
>
> (b) Comprehensive General Liability Insurance . . .;
>
> © Full form Protection and Indemnity Insurance on all vessels and floating equipment . . .;
>
> (d) Hull and Machinery Insurance . . .;
>
> (e) Collision and Liability Insurance for damage to vessels . . . .

R.37, Ex.A §§ 5.01.1; 5.01.01.1.

§ 2114, and accordingly, is not required to indemnify Riverboat against losses stemming from Showboat's failure to provide this insurance coverage.

Riverboat appeals this decision. It argues that the district court erred in finding that the Agreement unambiguously requires Riverboat to bear its own expenses in this context, given various inconsistencies among the Agreement's provisions. For example, insurance for liabilities arising under the Jones Act—which the district court held was one of the six required areas of coverage—is listed in the general, introductory paragraph in section 5.01.1, rather than in section 5.01.01.1, the subsection that allegedly enumerates and thereby limits Showboat's obligations. *See* R.37, Ex.A. Second, section 5.01.1 requires a policy with a $5,000,000 minimum; however, the minimum policy limits for the five types of coverages listed in section 5.01.01.1 range from $2,000,000 to $5,000,000 and total $14,000,000.[44] Third, section 5.01.1, in mandating that Riverboat be named as the insured party, uses the phrase "the foregoing policies." *Id.* § 5.01.1. In so doing, the Agreement's language clearly indicates that the immediately proceeding provision requiring insurance for "acts, omissions and injuries" is intended as a free-standing insurance and indemnification clause. *Id.* In light of these inconsistences, according to Riverboat, the only logical interpretation of section 5 of the Agreement is that the parties intended Showboat to obtain a separate, independent

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[44] The Agreement requires the purchase of $2,000,000 in Comprehensive General Liability Insurance (accident); $2,000,000 in Comprehensive General Liability Insurance (property damage); $5,000,000 in Full Form Protection and Indemnity Insurance on all vessels and floating equipment; and $5,000,000 Collision Liability Insurance. The other coverages listed in sections 5.01.1 and 5.01.01.1 do not specify their minimum limits.

insurance policy for general acts and omissions, with a minimum policy coverage of $5,000,000.

Showboat responds that the Agreement unambiguously limits its insurance obligation to the six types of coverage enumerated in sections 5.01.1 and 5.01.01.1. While section 5.01.1 does mention insurance for Riverboat's "acts, omissions and injuries," it also qualifies this broad language by limiting Showboat's employment-related liabilities to violation of the Jones Act. By contrast, all policies listed in section 5.01.01.1 pertain to property damage and third party liabilities, and logically cannot be read to include insurance for violation of 46 U.S.C. § 2114. Moreover, Showboat maintains that requiring it to insure Riverboat against a retaliatory discharge claim would contravene the underlying purpose of the Agreement: The Agreement obligates Riverboat to operate the vessel, including the hiring, firing and management of its crew, in compliance with applicable federal law and Coast Guard regulations. To indemnify Riverboat for flouting its obligations under the Agreement by firing the plaintiffs in violation of 46 U.S.C. § 2114 would thwart the Agreement's fundamental goal.

"Indemnity agreements are contracts subject to the rules and principles of contract construction." *TLB Plastics Corp. v. Procter & Gamble Paper Prods. Co.*, 542 N.E.2d 1373, 1377 (Ind. App. 1989). Therefore, whether Showboat is required to insure against, and now must indemnify, retaliatory discharge claims under 46 U.S.C. § 2114 is governed by state law principles of contract formation and interpretation. The parties appear to agree that Indiana law applies in this case. Our review of the district court's interpretation of this law is plenary. *See Salve Regina Coll. v. Russell,* 499 U.S. 225, 239, 111 S. Ct. 1217, 113 L. Ed. 2d

190 (1991) ("[C]ourts of appeals review the state-law determinations of district courts *de novo*.").

As a general matter, parties are free under Indiana law to enter into an indemnification clause and may obligate one party to insure against and/or to indemnify certain acts or omissions of the other party. *Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols*, 583 N.E.2d 142, 145 (Ind. App. 1991). However, it must be clear from the contract or surrounding circumstances that the burdened party agreed "knowingly and willingly" to insure against or indemnify the acts or omissions in question. *Id.*; *see also Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144, 148 (Ind. 1971) ("We do not mean to say or infer that parties may not make contracts . . . providing for indemnification, but it must be done knowingly and willingly as in insurance contracts made for that very purpose."). To ensure that a party is not saddled with an unintended burden to insure or indemnify, such provisions are "strictly construed . . . and will not be held to provide indemnity unless so expressed in clear and unequivocal terms." *Moore Heating*, 583 N.E.2d at 145 ("Courts disfavor such indemnification clauses because to obligate one party to pay for the negligence of the other party is a harsh burden which a party would not lightly accept."); *see also Exide Corp. v. Millwright Riggers, Inc.*, 727 N.E.2d 473, 480 (Ind. App. 2000) (holding that, because the indemnification clause "contain[ed] no clear statement that would give the contractors notice of the harsh burden that complete indemnification imposes," indemnification was inappropriate); *Ogilvie v. Steele by Steele*, 452 N.E.2d 167, 170 (Ind. App. 1983) (holding that "[an indemnification] clause must expressly state, in clear and unequivocal terms, that the indemnitor agrees to indemnify the indemnitee against the indemnitee's own negligence" (internal quotation marks omitted)).

The Agreement in this case does not "clear[ly] and unequivocal[ly]," *Ogilvie*, 452 N.E.2d at 170, require Showboat to obtain an insurance policy that covers the intentional violation of retaliatory discharge laws. To be sure, section 5.01.1 does speak generally of insurance coverage for "acts, omissions and injuries to persons or property" caused by Riverboat. R.37, Ex.A § 5.01.1. However, in light of the strict construction given indemnification agreements under Indiana law, we cannot conclude that the Agreement mandates insurance coverage or indemnification in this case. The Agreement does not require, much less mention, insurance for retaliatory discharge claims, or even the general violation of state or federal employment laws. It is true that the term "including" in section 5.01.1 may suggest a broad reading of Showboat's insurance obligations—one that may encompass, but is not limited to, Jones Act coverage. But that interpretation is by no means compelled by the contractual language.[45] Another reasonable interpretation is the one

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[45] For this reason, this case is easily differentiated from the Indiana state law cases cited above. *See, e.g., Ogilvie v. Steele by Steele*, 452 N.E.2d 167, 170-71 (Ind. App. 1983) (holding that the indemnification contract between an owner of train tracks and an owner and operator of a train "clearly and unequivocally" required indemnification for the track owner's negligence, given that the contract explicitly stated that the indemnification provisions "shall apply regardless of considerations of fault or negligence"); *see also Avant v. Cmty. Hosp.*, 826 N.E.2d 7, 11 (Ind. App. 2005) (holding that an indemnification clause that covers "all claims, demands, rights and causes of action of any kind, whether arising from [Avant's] own acts or those of Fitness Pointe," encompassed indemnification for negligent implementation of a fitness program). Unlike these contracts, the Agreement between Showboat and Riverboat does not specifically require Showboat to insure against the general violation of federal law, including violation of

adopted by the district court: that section 5.01.1 serves as an introductory paragraph, which sets forth Showboat's general obligation to obtain insurance coverage, and that its subsection, section 5.01.01.1, limits this obligation by specifying the scope of the requisite coverage. In light of these two conflicting but equally plausible interpretations, we cannot say that the Agreement, in "clear and unequivocal terms," *Moore Heating*, 583 N.E.2d at 145, provided Showboat "notice of the harsh burden that complete indemnification imposes," *Exide*, 727 N.E.2d at 480.

Two other reasons compel us to uphold the district court's grant of summary judgment in favor of Showboat. First, under Riverboat's interpretation, Showboat would be saddled with a practically limitless obligation to insure Riverboat against liability for *all* conceivable legal wrongs, up to a $5,000,000 policy limit. Yet, Riverboat has offered no evidence that the parties intended this result when contracting for insurance coverage. Second, even if the Agreement were unambiguously to mandate that Showboat obtain insurance coverage above and beyond the six categories of insurance enumerated in sections 5.01.1 and 5.01.01.1, the Agreement nevertheless cannot be read to require insurance coverage or indemnification in this case. The Riverboat defendants acted willfully and wantonly in terminating the plaintiffs, in violation of the plaintiffs' rights under § 2114. Indiana courts "have clearly and repeatedly affirmed the general proposition that public policy prohibits the use of insurance to provide indemnification for civil tort liability that results from an insured's intentional wrongdoing." *Sans v. Monticello Ins. Co.*, 676 N.E.2d 1099, 1102 (Ind. App. 1997) (quoting R.E. Keeton & A.I. Widiss, *Insurance Law* 518-19 (1988)).

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retaliatory discharge statutes.

Indeed, to require Showboat to indemnify Riverboat in these circumstances would be contrary to the purpose of the Agreement's other provisions, which place on Riverboat an obligation to ensure the vessel's compliance with state and federal law and regulations. *See also Riffle v. Knecht Excavating, Inc.*, 647 N.E.2d 334, 339 (Ind. App. 1995) (noting the obligation to read the contract as a whole, so as to give meaning to all of its provisions). Therefore, we affirm the district court's order granting summary judgment to Showboat on Riverboat's counterclaim.

Conclusion

For the foregoing reasons, we affirm the district court's judgment that the plaintiffs were discharged in retaliation for correspondence protected under 46 U.S.C. § 2114 and its calculation of the plaintiffs' remedies. We also affirm the district court's judgment that Showboat is not contractually obligated to indemnify Riverboat for its losses. We reverse the judgment of the district court as it relates to the finding of liability against Mr. Heitmeier, holding that there is no evidence substantiating his role in terminating the plaintiffs in retaliation for their correspondence with the Coast Guard. Additionally, we hold that the district court erred in finding that Mr. Doncet and Mr. Horton are not entitled to whistleblower protection under § 2114 and remand for further proceedings consistent with this opinion.

AFFIRMED in part and REVERSED and
REMANDED in part

A true Copy:

Teste:

/s/ _____
Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Case No. 2:98 cv 10

[Filed September 22, 2004]

MICHAEL P. GAFFNEY, THOMAS BELL, EDWARD ANDERSON, ROBERT BEARDON, THOMAS TRUNDY, THOMAS GOODRIDGE, DEAN HORTON, ADAM DONCET, ROBERT PALMER, NEIL REILLY, Plaintiffs	)
v.	)
SHOWBOAT MARINA CASINO PARTNERSHIP, SHOWBOAT INDIANA, INC., RIVERBOAT SERVICES, INC., RIVERBOAT SERVICES OF INDIANA, INC., ROBERT HEITMEIER, THOMAS A. GOURGUECHON. M/V SHOWBOAT, SHOWBOAT MARDI GRAS CASINO, Defendants	)

ORDER

This matter is before the court on the Rule 52 Motion for Judgment or, in the Alternative, for Amendment of Judgment Pursuant to Rule 59(b) filed by the defendants, Riverboat Services, Inc., Robert Heitmeier, and Thomas Gourguechon, on May 17, 2004. For the reasons set forth below, the motion is **DENIED**.

Background

On January 13, 1998, the plaintiffs filed suit alleging that the defendants violated 46 U.S.C. § 2114(a) by firing them in retaliation for reporting a safety violation to the United States Coast Guard. A bench trial was held on the matter, and on April 29, 2004, this court entered an order finding for all but two of the plaintiffs and against the defendants, Riverboat Services, Inc., Riverboat Services of Indiana, Inc., Robert Heitmeier, and Thomas A. Gourguechon.

Discussion

The defendants are seeking an alteration of the judgment, both with respect to the findings of fact, the judgment, and the damages that were imposed. Federal Rule of Civil Procedure 52(a) provides that this court must make findings of facts and conclusions of law in a bench trial. Rule 52(b) provides that the court may amend the findings upon motion filed no later than 10 days of the judgment. The Court of Appeals reviews conclusions of law following a bench trial *de novo* and reviews the findings of fact for clear error. *Cohen Development Company v. JMJ Properties, Inc.*, 317 F.3d 729, 735 (7th Cir. 2003). Federal Rule of Civil Procedure 59(e) further provides that the defendants may file a motion to alter or amend the judgment. The granting or denying of a motion to alter or amend judgment is reviewed for an abuse of discretion. *Trustees of the Aftra Health Fund v. Biondi*, 303

F.3d 765, 773 (7th Cir. 2002). A Rule 59(e) motion must "clearly establish a manifest error of law or an intervening change in the controlling law or present newly discovered evidence." *Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1121 n.3 (7th Cir. 2001).

The defendants do not provide newly discovered evidence nor do they argue that a change in the law necessitates reconsideration. Rather, the defendants re-hash arguments already made, and rejected, in their briefs subsequent to the bench trial. Moreover, the defendants have made new arguments regarding damages that never were made in their post-trial briefs. Just as in other motions for reconsideration, the defendants cannot now make arguments that they could have, and should have, made in their post-trial briefs. *Armstead v. Frank*, 2004 WL 1984466 *3 (7th Cir. 2004); *Mungo v. Taylor*, 355 F.3d 969, 978 (7th Cir. 2004). These arguments necessarily must fail for this reason alone. Nonetheless, the defendants' argument that the court made a "manifest error of law" and that the court's findings of fact are "clearly erroneous" will be addressed in turn.

First, the defendants state that the plaintiffs failed to prove each element of their claim and cite to *Seymore v. Lake Tahoe Cruise, Inc.*, 888 F.Supp. 1029 (E.D. Cal. 1995) for the proposition that "refusing a management directive because following the directive would violate a Coast Guard order or regulation did not constitute activity for which Section 2114 proved [sic] a remedy." (Def. Brief at p. 5) The defendants argue that no complaint was made about conduct by RSI and that, in fact, the plaintiffs did not believe that they were reporting a safety violation. Moreover, the defendants state that there was no safety violation reported. These arguments were made in the defendants' brief after trial, were rejected then, and also are without merit now.

Seymore concerned a refusal by a seaman to obey an order by his employer that he believed was unlawful. The district court held that Section 2114 does not protect a seaman who refuses an order, even when that order violates a Coast Guard directive, because the refusal is not a report to the Coast Guard of a safety violation. 888 F.Supp. at 1033. That case can be distinguished from the facts in this case because the plaintiffs did not refuse to obey an order. Rather, the plaintiffs made a report to the Coast Guard and subsequently were fired. The plaintiff in *Seymore* did not contact or attempt to contact the Coast Guard prior to being fired: he acted by refusing to comply with what he believed was an order that would violate a safety rule. Section 2114 essentially is a whistle-blower statute and obviously would not protect someone who has not reported to the regulatory agency. Here, the plaintiffs did report to a regulatory body and were fired as a result.

The defendants next argue that the plaintiffs did not complain about activity by RSI, but rather the actions of the Coast Guard. As indicated in this court's April 20, 2004 Order, Section 2114 does not specify whose conduct the plaintiffs could have complained about. The statute merely states that there must be a good faith report to the Coast Guard that the seaman believed that a safety violation has occurred. The defendants have provided no case authority that would limit the conduct complained about to an employer. Indeed, as this court noted, it would be unreasonable for the statute to be so limited - a safety violation, whether perpetrated by the defendants or the Coast Guard in contravention of its own regulations, has the same effect. The purpose of the statute is to ensure that sea-going vessels are operated safely. That the violation occurred as a result of the actions of the Coast Guard, and not the defendants, is not relevant to whether the defendants can be held liable for

retaliating against the plaintiffs for making a report of the violation. Again, the statute cannot be read as narrowly as the defendants want because the special status of seamen leads to a liberal construction of statutes protecting their rights.

The defendants also point to the testimony of Thomas Goodrich to show that the plaintiffs were not writing to the Coast Guard to report a safety violation and did not believe that there was a safety violation. In a section of the transcript cited by the defendants, the following exchange occurred:

Q. Sir, that was not my question. My question is: The Coast Guard never dealt with the issue of safety, did they?

A. Well, if that was the reason that they switched it over, then I would say no.

Q. Okay. And except for the Coast Guard denying it being a safety issue, they never came out and said, you're right, there's a safety violation onboard the vessel, correct?

A. Well, it wasn't a safety violation a-board vessel. It was a - it was - it was a -

Q. A technicality on the tonnage on where the ship was, correct?

A. That's the reason they swapped it back.

(Trial Transcript Vol. II, pp. 32-33)

The defendants state that this testimony was an admission that the plaintiffs did not believe that there was a safety violation on board the vessel.

However, on redirect, Goodrich testified that the plaintiffs sent a letter to the Coast Guard out of a "desire to advise the Coast Guard that you thought that there was a safety issue with respect to the lowering of [] licenses for engineers aboard the M/V Showboat." (Transcript Vol. II, p. 35) While the two pieces of testimony may appear to be in conflict, they must be read within the context of acrimonious nature of the defendants' cross-examination. Indeed, each of the other plaintiffs testified that he did believe that there was a safety violation on board the vessel.

The defendants also argue that even if the Certificate of Inspection (COI) constituted a safety violation, there was no showing that RSI hired limited license engineers and therefore there was no actual safety violation. This issue was addressed on pages 22-23 of the April order. The defendants are correct in noting that the objectionable COI was not acted upon by RSI. However, the violation of a safety rule, located in 46 C.F.R. § 15.101, was committed upon issuance of the COI - it required no affirmative act on the part of RSI to take advantage of the COI.

The defendants next argue that the plaintiffs did not make a report in good faith and that they did not believe that a safety violation did occur. These arguments are related to the credibility of the plaintiffs. The defendants are correct in noting that some of the plaintiffs' testimony was contradictory and that some of the plaintiffs were a little confused as to all of the specific differences between a limited licensed engineer and an unlimited licensed engineer. However, this court found their testimony credible with respect to their good faith

belief that a safety violation had occurred. Such a determination is within the province of this court, and the defendants have not shown that it was in clear error.

The defendants again reiterate that the plaintiffs were not fired in retaliation for reporting a safety violation and attempt to analogize this situation to retaliation in a Title VII case. The defendants are ignoring the most damning piece of evidence that the plaintiffs presented: the letter terminating Gaffney's employment. In that letter, the defendants admitted that they were firing him for reporting to the Coast Guard. The letter made no mention of union activity, of faulty wiring, or any other reason. The other plaintiffs were fired in rapid succession thereafter. All of the plaintiffs, except O'Neill, were terminated shortly after the defendants received notification, in the form of a new COI, that the plaintiffs were successful in their complaints to the Coast Guard. The defendants only removed the objectionable language in the termination letters because Gaffney told them that he could not be fired for reporting a violation to the Coast Guard. The defendants' attempt at trial to offer alternative reasons for terminating the plaintiffs was not credible because their reasons changed over the course of time. This court found the testimony of the plaintiffs more credible than that of the defendants. The defendants' motivation for firing the plaintiffs was because the plaintiffs reported to the Coast Guard that the COI violated safety regulations. This was the sole reason that the defendants fired the plaintiffs, not based on later asserted allegations of sabotage or union activity.

The defendants further argue that Heitmeier and Gourguechon should not be found individually liable because they did not own the M/V Showboat and were not in charge of the vessel. Section 2114 attaches liability to a broad range of individuals: "owner, charterer, managing operator, agent,

master, or individual in charge of a vessel." At the very least, the two individual defendants were managing operators of the vessel. They supervised the crew, they directed work on the vessel, and they managed labor relations. By the very plain meaning of the words, they were in charge of the vessel and the plaintiffs whom they fired. The defendants have provided no contrary authority on this point.

Finally, the defendants argue that punitive damages should not be awarded. It should be noted again that the defendants did not address this issue in their brief filed after trial and therefore have waived any argument regarding this issue entirely. The statute provided that the court "may order any appropriate relief" including equitable relief and reinstatement with back pay. 28 U.S.C. § 2114(b) (1984). As indicated in the April order, the language is open-ended and provides for a variety of relief, along with the specific relief enumerated in the statute. While in other areas of the law, punitive damages are not awarded as a matter of course because of statutory language, that is not the case here. The special nature of seamen and the open language of Section 2114, which is read liberally, allow for punitive damages in the amount assessed by the court. Heitmeier, who ordered Gourguechon to fire the plaintiffs and made the final hiring and firing decisions for RSI, wantonly and willfully disregarded the law. As with all of their arguments, the defendants now seek to cast a different light on the incredible testimony of Heitmeier and Gourguechon - testimony that this court already has rejected. Such a re-characterization of their testimony cannot be the basis for reversal, pursuant to either Rule 52 or Rule 59, of the judgment entered in this case.

One final allegation made by the defendants is troubling. In their briefs, the defendants state that "this Court stated that he saw no reason why he should not enter judgment for

Defendants" in a conversation which occurred in chambers and off the record. (Memorandum filed May 17, 2004, p. 4) It never has been the practice of this court to have substantive discussions with attorneys off the record. In a complicated bench trial, it is difficult to review all of the exhibits and depositions carefully before ruling on a defendant's motion for judgment filed at the conclusion of the plaintiff's case. In similar cases, the defendant's motion has been denied summarily, and a final judgment has been entered after all the evidence has been introduced and considered by the court.

If this court "saw no reason why" judgment should not have been entered in favor of the defendants, the judgment would have been entered, and the defendants would not have been required to present evidence. The Gourguechon letter was "a smoking gun", and a judgment in favor of the defendants before they offered a defense would have been inappropriate. All of the evidence has been considered carefully, and the judgment is supported by substantial evidence.

For the foregoing reasons, the Rule 52 Motion for Judgment or, in the Alternative, for Amendment of Judgment Pursuant to Rule 59(b) filed by the defendants, Riverboat Services, Inc., Robert Heitmeier, and Thomas Gourguechon, on May 17, 2004, is **DENIED.**

ENTERED this 22nd day of September, 2004

s/ ANDREW P. RODOVICH
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Case No. 2:98-cv-10

[Filed May 5, 2004]

MICHAEL P. GAFFNEY, et al. Plaintiffs	))
v.	)
SHOWBOAT MARINA CASINO PARTNERSHIP, et al. Defendants	)))

JUDGMENT IN A CIVIL CASE

[x] **Decision by Court.** This action came to trial, hearing or consideration before the Court. The issues have been tried, heard or considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment for the plaintiffs in the amounts listed below:

Gaffney	35,632.00
Goodrich	126,505.00
Anderson	77,060.00
Bell	55,564.00
Beardon	122,046.00
Palmer	127,767.00
Trundy	113,564.00
Reilly	25,100.00

Further ordered judgment entered for the defendants, Riverboat Services, Inc., Riverboat Services of Indiana, Inc., Robert Heitmeier, and Thomas G. Gourguechon and against the plaintiffs, Dean Horton and Adam Doncet.

Stephen R. Ludwig, Clerk

By /s/ Pat Miller
Deputy Clerk

Equivalent Coupon Issue Yield: 1.50

This document entered pursuant to Rules 79(a) and 58 of the Federal Rules of Civil Procedure on **May 5, 2004**.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Case No. 2:98 cv 10

[Filed April 29, 2004]

MICHAEL P. GAFFNEY, THOMAS BELL, EDWARD ANDERSON, ROBERT BEARDON, THOMAS TRUNDY, THOMAS GOODRIDGE, DEAN HORTON, ADAM DONCET, ROBERT PALMER, NEIL REILLY, Plaintiffs	)
v.	)
SHOWBOAT MARINA CASINO PARTNERSHIP, SHOWBOAT INDIANA, INC., RIVERBOAT SERVICES, INC., RIVERBOAT SERVICES OF INDIANA, INC., ROBERT HEITMEIER, THOMAS A. GOURGUECHON, M/V SHOWBOAT, SHOWBOAT MARDI GRAS CASINO, Defendants	)

ORDER

This matter is before the court on the Post-Trial Briefs filed by the parties subsequent to a bench trial held on August 19, 2002.

LIABILITY

Findings of Fact

Each of the plaintiffs, Michael Gaffney, Thomas Bell, Edward Anderson, Robert Beardon, Thomas Trundy, Thomas Goodridge, Dean Horton, Adam Doncet, Robert Palmer, and Neil Reilly, worked as licensed seamen on the Motor Vessel Showboat which is owned and operated by the various inter-related defendants who are involved in the gaming business. As a vessel which operates on Lake Michigan, the M/V Showboat is regulated by the United States Coast Guard and is issued a Certificate of Inspection (COI) which must be complied with at all times. This dispute arose when the Coast Guard issued a COI at the request of the defendants that lowered the license requirement of engineers aboard the M/V Showboat in April 1997. The plaintiffs generally believed that the lowering of the requirements created a safety hazard onboard the vessel. After the plaintiffs appealed the decision of the Coast Guard and the defendants were notified of the Coast Guard's decision, the plaintiffs were fired. The plaintiffs contend that they were fired in retaliation for reporting a safety violation. As such, the plaintiffs allege that the defendants violated 46 U.S.C. § 2114(a), a federal anti-discrimination statute enacted for the protection of seamen.

The defendants are all interrelated companies. Showboat, Inc. is the parent company of its wholly owned subsidiary, Showboat Indiana, Inc. Showboat and Showboat Indiana are partners, along with others, who own Showboat Marina Casino Partnership (collectively Showboat). During the

relevant time period, Keith Wallace managed and directed Showboat activities at its East Chicago facility and the M/V Showboat. Thus, he was the Chief Executive Officer and President of Showboat's East Chicago operation.

The other corporate defendants, Riverboat Services, Inc. and Riverboat Services of Indiana, Inc. (collectively RSI), are related companies headed by Robert Heitmeier, a defendant and the President and sole shareholder of Riverboat Services, Inc. RSI contracted with Showboat Marina Casino Partnership to operate the M/V Showboat and to provide a marine crew. Their agreement, the Marine Management Services Agreement, was entered into on October 28, 1996 and amended on November 3, 1997. Thomas Gourguechon, the remaining defendant, was the Director of Marine Operations for RSI and the Director of Project Management for Showboat Marine Casino Partnership. Gourguechon started working for RSI as the Director of Marine Operations in January of 1997. While Wallace and Heitmeier do not have a current business relationship, they are still friends.

Every ship, like the M/V Showboat, has a compliment of engineers who are tested and licensed by the Coast Guard. Engineers can hold either limited or unlimited licenses from the lowest engineering level, Third Assistant Engineer, to the highest, Chief Engineer. An engineer who holds an unlimited license can work in that capacity on a ship of any amount of tonnage or horsepower and on any body of water. An engineer holding a limited license only is licensed to perform duties on ships up to a particular tonnage or horsepower and/or only in various types of waters oceans, lakes, etc.). Regulations detail the education and experience required to reach each engineering level. *See* 46 CFR §§ 10.501-10.524. For example, according to a chart located at 46 CFR § 10.505, a Chief Engineer holding a limited license, after 12

months of service (plus various other requirements), can attain the status of a Second Assistant Engineer Unlimited.

Engineers generally are responsible for repairing and maintaining the ship's engines, electrical systems, and safety devices. A Chief Engineer also is charged with managing other engineers, being aware of and following regulations promulgated by the Coast Guard and other administrative agencies, and communicating with the Captain of the ship. Engineers are key safety officers because of the dangers in the engine room including the ever-present possibility of fire. During the relevant time period, Michael Gaffney was a Chief Engineer Unlimited aboard the M/V Showboat, Thomas Bell was a Captain, Edward Anderson was a First Deck Mate, Robert Beardon was a Chief Deck Mate Unlimited, Thomas Trundy was an Assistant Engineer, Thomas Goodridge was a First Assistant Engineer Unlimited, Dean Horton was a Third Deck Mate Unlimited, Adam Doncet was a Third Assistant Engineer Unlimited, Robert Palmer was a Third Assistant Engineer Unlimited, and Neil Reilly was a Chief Engineer Unlimited.

The M/V Showboat arrived in East Chicago in January 1997 and began taking passengers in April 1997. The COI at issue here was the first one posted by the Coast Guard. On August 27, 1996, Heitmeier wrote a letter to Lieutenant Commander Rich Brundrett of the Coast Guard seeking a waiver of 46 CFR § 10.501(b)[1] which designated the category

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[1] The regulation states:

(b) Engineer licenses issued in the grades of chief engineer (limited) and assistant engineer (limited) of steam and/or motor vessels allow the holder to serve within any horsepower limitations on vessels of any gross tons on

of engineers that may serve depending on the tonnage of the ship and where it was sailing. Heitmeier generally wanted a waiver of the requirement that a vessel of 1600 gross tons or more operating on the Great Lakes, like the M/V Showboat, must have engineers with an unlimited license.

On April 11, 1997, the Coast Guard issued a COI to the M/V Showboat stating that "AN INDIVIDUAL HOLDING A LICENSE AS CHIEF ENGINEER LIMITED OR ASSISTANT ENGINEER LIMITED MAY SERVE AS A CHIEF ENGINEER OR ASSISTANT ENGINEER, RESPECTIVELY." (Pl. Exh. 3 (emphasis in original)) The Coast Guard thus waived the requirement that the M/V Showboat carry unlimited licensed engineers. On August 11, 1997, a number of officers aboard the M/V Showboat mailed a letter to the Coast Guard seeking its "assistance in providing . . . information" regarding the lowering of the license requirements from unlimited to limited license-holders. (Pl. Exh. 4) This letter was sent shortly after the signatories learned of the endorsement on the COI allowing for limited license engineers. Of the plaintiffs, only Gaffney, Goodridge, Horton, Doncet, Palmer, and Reilly signed this letter. The other signatories were Captain James Sternwedel, Captain Steve Habermehl, Captain Dennis Myatt, Chief

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inland waters and of not more than 1600 gross tons in ocean, near coastal or Great Lakes service in the following manner:

(1) Assistant engineer (limited-oceans) may serve on ocean waters;
(2) Chief engineer (limited-near coastal) may serve on near coastal waters; and,
(3) Chief engineer (limited-oceans) may serve on ocean waters.

Engineer Duane Hunt, Mate Mark LaValley, and Mate Eric James. This letter, and the following letters, were authored and mailed by Gaffney who handled the plaintiffs' correspondence with the Coast Guard.

In a letter dated October 3, 1997, Gaffney, alone, sent a letter to the Coast Guard indicating his belief that lowering the license requirement would have a negative affect on the safety of the vessel. (Pl. Exh. 5) Gaffney concluded this letter by again seeking information. On October 10, 1997, Gaffney authored another letter to the Coast Guard seeking a 30 day extension to "appeal the changes in the licensing requirements" and in fact appealing the endorsement on the COI. The lengthy letter again reiterated the plaintiffs' view that the April 11, 1997 COI could lead to safety problems and that the Coast Guard should rescind the COI and replace it with a certificate that required unlimited licensed engineers. (Pl. Exh. 7) This letter was signed by all of the plaintiffs, except Horton and Doncet, in addition to other non-parties. Horton and Doncet did not tell anyone at RSI about their involvement in the letter writing campaign. It also appears that this letter was mailed to various United States Senators and Congressmen because the plaintiffs believed that this COI issue may have been politically motivated.

In response to this letter, the Coast Guard, in a letter dated October 31, 1997, stated that it "do[es] not agree that the use of limited licensed engineers threatens the safety of the M/V Showboat." (Pl. Exh. 10) As directed by the Coast Guard, Gaffney appealed the matter to the Ninth Coast Guard District Commander on November 17, 1997. The appeal was granted on December 19, 1997, and Captain G.S. Cope, on the direction of the Ninth Coast Guard District Commander, reversed the Coast Guard's previous position and ordered the

removal of the endorsement. In doing so, Captain Cope stated:

> In reviewing the record of this appeal, I found that the endorsement of the M/V SHOWBOAT's certificate of inspection to allow limited engineers, did not comply with 46 CFR 15.915. That regulation authorizes individuals licensed as Chief Engineer (limited) or Assistant Engineer (limited) to serve as Chief or Assistant Engineer on vessels up to 1,600 Gross Tons upon the Great Lakes. Since the M/V SHOWBOAT is greater than 1,600 Gross Tons, an individual holding only a "limited" engineer license could not legally serve as the vessel's Chief or Assistant Engineer.
>
> (Pl. Exh. 12)

On December 31, 1997, the Coast Guard sent an amended COI to RSI deleting the endorsement allowing for limited license engineers. (Pl. Exh. 13)

During January 1998, each of the plaintiffs' employment was terminated starting with Gaffney on January 6, 1998. In Gaffney's termination letter signed by Gourguechon, RSI indicated that he was being terminated because of

> [u]nauthorized communication and correspondence with regulatory bodies having jurisdiction over the operation of the vessel. Unauthorized correspondence and the regulators response has had a material adverse effect on the company's ability to efficiently run it's [sic] business.
>
> (Pl. Exh. 14)

After receiving this letter, Gaffney told Gourguechon that he could not be fired for the reason stated. This explanation was not offered in any of the subsequent termination letters which simply stated that each of the plaintiffs were terminated effective immediately. (Pl. Exhs. 15-22) Only one plaintiff, Neil Reilly, was not fired: he left voluntarily on February 1, 1998 for another job when he was told to do so by Gourguechon.

Each of the plaintiffs testified that his main concern regarding the COI was that the vessel would be unsafe if limited license engineers were allowed to do the work of unlimited license engineers. Their conclusion was based on the understanding that an unlimited license holder generally had more years of engineering experience than a seaman who only had a limited license. However, the plaintiffs stated that they never told the Captain of the vessel not to take the ship out because it was unsafe after the issuance of the COI with the endorsement. Gaffney did indicate that he spoke to Thomas Gourguechon in August 1997 regarding the COI and his concerns.

At trial, the defendants offered other reasons for firing the plaintiffs including improper union activity and sabotage. During this time period, a significant amount of union activity was occurring in and around the vessel. A number of unions, including the Seafarers International Union (SIU), the Marine Engineers Benevolent Association (MEBA), and the International Longshoremen's Association (ILA), were attempting to organize the employees of RSI and were actively picketing in front of the vessel. There also was evidence that the union activity was violent at times. Gaffney testified that during the Spring of 1997 Heitmeier indicated to him that he had to join SIU, but Gaffney did not want to join that union. Gaffney was not told that he was being fired for

this reason. Beardon testified that he was told by Heitmeier that he must join SIU or that he would be fired, but this was nine months prior to his discharge. RSI generally wanted its employees to join SIU, but Gaffney, Goodrich, Doncet, and the other plaintiffs wanted to join MEBA. After Goodrich was fired, he walked the picket line in favor of MEBA along with most of the other plaintiffs. Some of the plaintiffs also authored complaints to the National labor Relations Board and various Senators and Congressmen with respect to Riverboat Services preference for SIU in the Summer of 1997.

The union activity also disrupted the casino business aboard the M/V Showboat when it opened in April 1997. Union members, by their presence, may have dissuaded customers from entering the boat and gambling. The MEBA seemed to be particularly aggressive in this respect. Wallace had at least three "run-ins" with the MEBA, and in one instance, members of the union barged into Wallace's East Chicago office and were escorted out by security. Wallace indicated that he directed Heitmeier to get rid of any employee involved in the union activity because he did not want to deal with the aggravation of the union activity. He made no such request of Gourguechon. While the plaintiffs were employed by RSI, Wallace believed, as the head of Showboat's operation, that he had the duty and authority to fire RSI and anyone else involved in the project. Heitmeier also understood that Showboat had the "last word" in hiring or firing employees even though both he and Gourguechon did hire and fire the plaintiffs.

After the firings in January 1998, Wallace believed that the operation ran smoothly. During this time period, RSI routinely fired personnel for a number of different reasons. These individuals had nothing to do with the plaintiffs' letters

to the Coast Guard. Wallace had no independent knowledge of who in particular was fired.

During 1997, the M/V Showboat also was being rewired because the gaming machines were being re-positioned. A number of the plaintiffs were involved in the rewiring. However, none of the plaintiff deck officers were involved in the re-wiring and may have had only tangential supervisory authority over the engineers who were doing the re-wiring. Because the ship was open to gamblers 20 hours each day, any re-wiring had to be done during a four hour period. However, routine cleaning and maintenance further reduced the actual time the plaintiffs could work on the project. Everyone understood that some of the wiring had to be installed on a temporary basis and then brought up to code during the next shift. Gourguechon was aware of this problem.

Some of the plaintiffs, including Goodrich, Reilly and Trundy, were aware of some improper wiring that may have caused a circuit breaker to blow. None of the plaintiffs were aware that they were accused of sabotage because of this occurrence until after this lawsuit was filed and after the depositions of Heitmeier and Gourguechon. Each of the plaintiffs specifically denied participating in any acts of sabotage. A few of the plaintiffs even received letters of recommendation from Gourguechon, including Anderson, Beardon, and Bell. Horton and Doncet asked for a letter of recommendation but were not given one.

Over the course of the Summer and Fall of 1997, Gourguechon believed there was a pattern of "things going on" that concerned him including the sometimes violent union activity and the failure of two expensive circuit breakers. Gourguechon believed that the plaintiffs were involved in

disrupting the smooth running of the vessel and that some of the plaintiffs, including Gaffney and Wood, were being manipulated by the unions. Heitmeier also believed that certain people, including Goodrich, Trundy, Gaffney, Palmer, Bell, Anderson, Doncet, and Wood were involved in sabotaging the boat. Indeed, Heitmeier believed that Gaffney was "conspiring" to disrupt the operations of the boat in relation to the union activity and testified that this was the true reason why Gaffney was terminated. However, they had no specific evidence that any of the plaintiffs were involved in any union violence or in any acts of sabotage. Nonetheless, Heitmeier told Gourguechon to fire them all, not only because of the re-wiring issues but also because of their involvement in union activities. Heitmeier indicated that while he did not tell Gourguechon to fire anyone in particular, he authorized Gourguechon to fire anyone involved in the electrical problems and those involved in union activities.

The defendants thus maintained that the plaintiffs were not fired for their correspondence with the Coast Guard regarding safety issues. Indeed, after reading the October 20, 1997 letter, Gourguechon believed that the plaintiffs were merely concerned that the COI endorsement might result in RSI hiring less experienced workers and lowering their wages. Gourguechon stated that he did not believe that a change in the COI would have negatively affected RSI's operation and Heitmeier testified that he was not aware of any issues regarding the COI until this lawsuit was filed. And yet, Gourguechon testified that he did not tell any of the plaintiffs that they were in fact being fired for sabotage because he did not want to hurt anyone's career.

Procedural Background

The plaintiffs filed their complaint on January 13, 1998 and an Amended complaint on January 26, 1998. On September 25, 1998, the Honorable James T. Moody denied the defendants' motions to dismiss. On October 29, 1998, the plaintiffs filed their Second Amended Complaint naming Showboat Marina Casino Partnership, Showboat, Inc., Showboat Indiana, Inc.,[2] Showboat Mardi Gras Casino, Robert Heitmeier, Thomas A. Gourguechon, and the M/V Showboat as defendants. Count I of this complaint alleges that the defendants violated 46 U.S.C. §2114. Count II alleges that the defendants violated general Maritime Law by wrongfully terminating their employment. Count III alleged an *in rem* action against the M/V Showboat. Finally, Count IV alleges that the defendants violated Indiana State law by wrongfully terminating them for exercising a statutory right. The plaintiffs requested reinstatement with back pay, compensatory damages, punitive damages, injunctive relief, and attorney fees. All of the Showboat defendants except Showboat Mardi Gras Casino filed an Answer on December 10, 1998. The two Riverboat defendants, Heitmeier, and Gourguechon filed an Answer on December 11, 1998.

On December 10, 1998, the Showboat defendants filed a crossclaim against the Riverboat defendants. The Riverboat defendants, in turn, filed a crossclaim against the Showboat defendants on March 1, 1999. On November 9, 2000, Judge Moody denied the Riverboat defendants' motions for summary judgment with respect to the claims of all the

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[2] Despite being included in the caption, the plaintiffs do not list Showboat Indiana, Inc. in paragraph 3 where they list the other Showboat defendants. (Second Am. Comp. at ¶ 3)

plaintiffs. However, Judge Moody did grant summary judgment with respect to the state law claims of Trundy, Goodridge, Doncet, and Palmer. On November 16, 2000, Judge Moody granted summary judgment to the Showboat defendants only with respect to the Riverboat defendants' counterclaim. Thus, most of the plaintiffs' claims remained pending against all of the defendants.

On April 17, 2002, the plaintiffs and the Riverboat defendants consented to the jurisdiction of the Magistrate Judge. On August 13, 2002, Showboat Marina Casino Partnership, Showboat, Inc., Showboat Indiana, Inc., Showboat Mardi Gras Casino, and the M/V Showboat were ordered severed from this lawsuit. These Showboat defendants and the plaintiffs have indicated to the court that they have settled their claims. Thus, the only remaining defendants in this action before this judge are the two Riverboat defendants, Heitmeier, and Gourguechon.

Conclusions of Law

46 U.S.C. §2114(a)[3] provided:

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[3] This statute recently was amended by the Maritime Transportation Security Act of 2002 in a manner unrelated to the issues presented here. Pub. L.No. 107-295, 116 Stat. 2064 (2002). The Act now provides, in relevant part:

> (a) (1) A person may not discharge or in any manner discriminate against a seaman because
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> (A) the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed

> An owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.

Statutory language usually is given its plain and ordinary meaning while keeping in mind the intent of Congress and the common meaning of the words. *Nestle Holdings, Inc. v. Central States, Southeast and Southwest Areas Pension Fund,* 342 F.3d 801, 804-05 (7th Cir. 2003) ("The basic rule in statutory interpretation is that plain statutory language governs."); *Future Source LLC v. Reuters LTD.,* 312 F.3d 281, 285 (7th Cir. 2002) ("Nonsensical interpretations of contracts, as of statutes, are disfavored."); *Sanders v. Jackson,* 209 F.3d 998, 1000 (7th Cir. 2000) ("The cardinal rule is that words used in statues must be given their ordinary and plain meaning."); *United States v. Aerts,* 121 F.3d 277, 280 (7th Cir. 1997) ("Only when adherence to the text of a statute would lead to absurd results or clearly be inconsistent with the drafters' intentions is departure from the plain meaning of the statute justified."). The Seventh Circuit recently has stated:

> Usually when a statutory provision is clear on its face the court stops there, in order to preserve language as

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under that law or regulation has occurred ....

The revised statute also limited the amount of attorney fees that can be recovered by either a prevailing plaintiff or defendant. 46 U.S.C. §2114(b) (3) - (4).

> an effective medium of communication from legislatures to courts. If judges won't defer to clear statutory language, legislators will have difficulty imparting a stable meaning to the statutes they enact. But if the clear language, when read in the context of the statute as a whole or of the commercial or other real-world (as opposed to law-world or word-world) activity that the statute is regulating, points to an unreasonable result, courts do not consider themselves bound by "plain meaning," but have recourse to other interpretive tools in an effort to make sense of the statute.
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> *Schlosser v. Fairbanks Capital Corporation,* 323 F.3d 534, 537-38 (7th Cir. 2003)

This particular statute was enacted on October 30, 1984 as part of a general appropriations bill for the Coast Guard entitled the Coast Guard Authorization Act of 1984. *See* Pub.L.No. 98-557, 98 Stat. 2860. Congress enacted the statute in response to a Fifth Circuit case, *Donovan v. Texaco,* 720 F.2d 825 (5th Cir. 1983). The *Donovan* court held that the Occupational Safety and Health Act's prohibition of retaliatory discharge did not apply to seamen. 720 F.2d at 825. Thus, an engineer aboard a vessel who complained to the Coast Guard about deficiencies in certain equipment and was fired because he complained had no cause of action under OSHA

Section 2114 is straightforward: a designated person essentially cannot fire a seaman who has reported what he believes is a safety violation to a regulatory agency. The object of the statute also is clear: to encourage seamen to report safety violations onboard their vessels. While the statute does not specifically state that the alleged safety

violation must have been committed by the vessel owner rather than a third party, it would be unreasonable to hold that the reporting of a perceived violation committed by a third party, like the Coast Guard itself, does not fall within the ambit of the statute. The purpose is to promote safety and to remedy unsafe conditions on a vessel. *Garrie v. James L. Gray, Inc.*, 912 F.2d 808, 812 (5th Cir. 1990) (stating that the "evident purpose [of §2114] is to promote compliance with maritime statutes and regulations by encouraging seamen (who are in the best position to observe violations) to make reports to the Coast Guard without fear of termination or other reprisals."). *See also Seymore v. Lake Tahoe Cruises, Inc.*, 888 F.Supp. 1029, 1033 (E.D. Cal. 1995). It is irrelevant who committed the alleged safety violation as long as it is perceived as such and reported in good faith to a regulatory agency.

In other areas of maritime law and the adjudication of the rights of seamen, a number of courts have recognized the special status of seamen. In *Richards v. Relentless, Inc.*, 341 F.3d 35, 41 (1st Cir. 2003), the court recognized that the relationship between the employer and a seaman is similar to a beneficiary or fiduciary in the area of employment contracts. *See also Isbrandtsen Marine Services, Inc. v. M/V Inagua Tania*, 93 F.3d 728, 733 (11th Cir. 1996) (recognizing that seamen are "wards of admiralty" (citation omitted)); *MacPhail v. Oceaneering International, Inc.*, 170 F.Supp.2d 718, 725 (S.D. Tex. 2001) ("A strong policy favoring the protection of seaman [sic] is deeply entrenched in our legal system."). A number of courts also have recognized that statutes which are designed to protect the rights of seamen must be liberally construed. *Governor and Company of the Bank of Scotland v. Sabay*, 211 F.3d 261, 266 (5th Cir. 2000) ("Legislation enacted for seamen's benefit is to be liberally construed in their favor."). Such recognition cautions against

restrictively interpreting Section 2114 and favors a liberal reading of the statute.

In addition to Section 2114, the plaintiffs have alleged violations of general maritime law and Indiana state law arising out of the same operative facts as their claim under Section 2114. Under general maritime law, a seaman is an employee-at-will, barring a contractual agreement, and can be discharged for almost any reason. *Meaige v. Hartley Marine Corporation,* 925 F.2d 700, 702 (4th Cir. 1991); *Seymore,* 888 F.Supp. at 1034-35. However, general maritime law does recognize the tort of wrongful discharge when a seaman is terminated in contravention of an "important public policy." *Kretzer v. Hess Oil Virgin Islands Corporation,* 218 F.Supp.2d 724, 727 (D.C. Virgin Islands 2002). *See also Smith v. Atlas Off-Shore Boat Service, Inc.,* 653 F.3d 1057, 1063 (5th Cir. 1981) (recognizing the maritime tort of wrongful discharge where a seaman was terminated in retaliation for filing a personal injury action). In determining what is a wrongful discharge, "admiralty law sometimes looks to state law for the rule of decision, [however] it does so only when there is no admiralty rule on point and when doing so would not undermine uniformity." *Meaige,* 925 F.2d at 702-03. *See also Becker v. Poling Transportation Corporation,* 356 F.3d 381, 389 (2nd Cir. 2004) (stating that "[i]n admiralty cases, federal maritime law applies where it exists" (citation and quotation marks omitted)); *Persson v. Scotia Prince Cruises, Ltd.,* 330 F.3d 28, 32 (1st Cir. 2003) (holding that state law applies when maritime law is silent but does not apply if it is in conflict with maritime law or "the reasonably settled expectations of maritime actors" (citation and quotation marks omitted)); *Kretzer,* 218 F.Supp.2d at 728-29. As a specific statute confers a cause of action to the plaintiff, the fall-back position to general maritime law is unnecessary.

General maritime law is only relevant to the plaintiffs' damages which will be discussed below.

Indiana courts also recognize the tort of wrongful or retaliatory discharge. *See McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 393 (Ind. 1988) (recognizing a cause of action for an employee who is fired because he would not perform an illegal act for which he could be held liable); *Frampton v. Central Indiana Gas Company*, 297 N.E.2d 425, 428-29 (Ind. 1973) (recognizing a cause of action for an employee who is "discharged solely for exercising a statutorily conferred right"). Indiana's wrongful discharge laws are not necessarily preempted by federal maritime law. *Zbylut v. Harvey's Iowa Management Co., Inc.*, 361 F.3d 1094, 1095 (8th Cir. 2004). However, it is unclear whether the plaintiffs' firing would be within the public policy exception of Indiana's at-will employment doctrine. *See Knight v. Pillsbury Company*, 761 F.Supp. 618, 620-21 (S.D. Ind. 1990) (noting that Indiana courts have not recognized a cause of action for retaliatory discharge beyond workmen's compensation claims). In any event, a specific federal statute confers a cause of action and remedies to the plaintiffs in this case. Thus, any state law claim that the plaintiffs may have is preempted by federal law.[4] Moreover, given the necessity of uniformity in maritime law, it would be unreasonable to apply Indiana law to the plaintiffs' claims.

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[4] Without getting into a lengthy preemption dissertation which neither of the parties addressed in their briefs, the state law here does not necessarily conflict with federal law. However, in the area of admiralty and the regulation of seamen, it is clear that federal law "has occupied the field so thoroughly" that state law would have little meaning. *See generally Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493, 497 (7th Cir. 2004).

The plaintiffs' claims are governed by Section 2114 and not Indiana state law.

For the following reasons, the court finds that the defendants, Riverboat Services, Inc., Riverboat Services of Indiana, Inc., and the individual defendants Heitmeier and Gourguechon violated 46 U.S.C. §2114 by firing Gaffney, Bell, Anderson, Beardon, Trundy, Goodridge, Palmer, and Reilly for reporting a safety violation to the Coast Guard.

With respect to liability, there are five interrelated issues to be resolved: 1) whether the plaintiffs "reported" a violation of a safety law; 2) whether the plaintiffs made a "good faith" report; 3) whether the plaintiffs had a "belief" that a safety law had been violated; 4) whether the plaintiffs were fired because of this report; and 5) whether the individual defendants, Gourguechon and Heitmeier, can be held individually liable.

First, the plaintiffs did report a safety violation in their October 10, 1997 Appeal which sought the removal of the limited endorsement on the COI. This is not a situation where the plaintiffs merely were seeking information as they did in their first letter to the Coast Guard on August 11, 1997. Thus, this case can be distinguished from *Garrie,* where the Fifth Circuit found that merely telephoning the Coast Guard, without identifying oneself and the vessel in question, to inquire as to whether certain regulations were in effect was not a report of a violation of maritime safety law. In the October 10, 1997 Appeal, the plaintiffs specifically stated:

> It is our contention that the change in licensing requirements for the engineers on the M/V Showboat Mardi Gras from Unlimited to Limited has served to

> potentially and substantially compromise safety standards aboard the vessel.
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> (Pl. Exh. 7 at p. 1)

While the plaintiffs may not have used the catchword "report," it is hard to imagine that Congress would have intended for such specificity, and the statute itself does not prescribe the manner in which such a report must be made. A report is merely "[a]n account presented usually in detail" or "[t]o complain about or denounce." *The American Heritage Dictionary*, (2nd College ed. 1982). This is exactly what the plaintiffs did. They complained about the limited endorsement on the COI and sought its removal: they reported what they believed was a violation of a safety law.

With this in mind, two of the plaintiffs, Horton and Doncet, did not sign the October 10, 1997 letter and did not let anyone at RSI know about their concerns regarding the endorsement on the COI. The only evidence presented was that Gourguechon read and was aware of the October 10, 1997 letter and not the earlier August letter. Common sense dictates that a defendant must be aware of a plaintiff's report of a safety violation prior to the firing of that plaintiff in order for there to be a causal relationship between the two. Because RSI was not aware of the involvement of Horton and Doncet, those two plaintiffs have not established that they were fired as a result of this Appeal.

The next two issues are closely related. The court finds that the plaintiffs made a good faith report and that they believed that the limited endorsement presented a danger to the vessel. Good faith is a term often used in the law and generally means that the plaintiffs were not motivated by an improper purpose. Each of the plaintiffs testified that he

believed that a limited license engineer would not have the same amount of experience as an unlimited license engineer - especially with regard to the Chief Engineer position. It was reasonable for the plaintiffs to believe that the more experience an engineer had on a vessel, the more capable he would be in performing various safety duties and in reacting to an emergency. While there was some evidence that a limited license engineer may in fact have more experience and be more qualified than some unlimited license holders, this concession does not negate the plaintiffs' beliefs. Each of the plaintiffs, who were engineers and/or worked around other engineers, would have unique experience and expertise in determining whether an unlimited license holder was preferable to a limited license holder. Thus, the plaintiffs believed that the limited endorsement could present a danger and they reported this danger in good faith.

The safety law at the heart of the plaintiffs' complaint was that Coast Guard rules did not allow an engineer with a limited license to serve on a vessel like the M/V Showboat which operated on the Great Lakes. While RSI did not hire any limited license engineers after the COI with the endorsement was issued, RSI could have hired such engineers in part because they commanded lower wages than those engineers with unlimited licenses.

The specific license requirements for various waters and tonnage are located in Chapter 46, part 15 of the Code of Federal Regulation. 46 C.F.R. §15.101 provides:

> The purpose of the regulations in this part is to set forth uniform minimum requirements for the manning of vessels. In general, they implement, interpret, or apply the specific statutory manning requirements in Title 46, United States Code, Parts E & F, implement

> various international conventions which affect merchant marine personnel, and provide the means for establishing the complement necessary for *safe operation of vessels*. (emphasis added)

If the regulations do not allow for a limited license holder to serve on a vessel on the Great Lakes weighing 1600 gross tons or more, then allowing such an engineer would be unsafe. The report by the plaintiffs did concern this safety matter and specifically highlighted a violation of 46 C.F.R. §15.915, a regulation designed to make vessels safer.

Notwithstanding the concern regarding the COI, the evidence also revealed that there was a significant amount of union activity around the M/V Showboat and that the defendants and plaintiffs were on opposite sides with respect to which union the plaintiffs should join. The defendants believed that this was the motivating factor for the plaintiffs contacting the Coast Guard. The connection between the plaintiffs' motivations for reporting the changes to the COI and the union activity was tenuous at best. While it is clear that the union problems were a concern of many of the plaintiffs, there was no direct link between such activities and the plaintiffs' honest belief that the COI endorsement could lead to a potential catastrophe on the lake. The evidence showed that the plaintiffs were pursuing independent remedies for the union activities by writing different letters and participating in an NLRB action. Therefore, the evidence showed that the plaintiffs did believe that a safety law had been violated and that this motivated their report to the Coast Guard.

The next issue is whether the plaintiffs actually were fired for making this report. As noted above, there is no precedent which outlines the causal requirements of Section 2114. Each

of the parties has analogized this requirement to two different tests used in other areas of the law. The defendants argue that the retaliation must be the *sole* cause of the discharge while the plaintiffs argue that the retaliation need only be *one* of the reasons for the discharge. In other causes of action, the causal relationship in retaliation cases can be proven through various tests. In *Smith,* the Fifth Circuit considered a situation where a seaman was terminated for filing suit against his employer under the Jones Act. In analyzing the seaman's claim with respect to causation, the court stated:

> In order to prevail on the retaliatory discharge claim, the seaman must affirmatively establish that the employer's decision was motivated in substantial part by the knowledge that the seaman either intends to file, or has already filed a personal injury action against the employer. The employer may, on the other hand, defeat the seaman's action by demonstrating that the personal injury action was not a substantial motivating factor for the discharge.
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> *Smith,* 653 F.2d at 1063

Thus, the reason for termination need not be the only reason but must be the substantially motivating reason. In interpreting Indiana law on retaliatory discharge, the Seventh Circuit has found that a plaintiff cannot show only that he exercised a right and that he was terminated. *Mack v. Great Dane Trailers,* 308 F.3d 776, 784 (7th Cir. 2002) Nonetheless, the court found that retaliation can be "inferred from the 'rapidity and proximity in time'" between the employee's actions and the termination. *Mack,* 308 F.3d at 784. In addition, the plaintiff also can prevail if he shows that the defendant's proffered reasons are "'patently inconsistent' with the evidence before the court." *Mack,* 308 F.3d at 784.

In civil rights cases, a causal connection between the protected activity and the termination must be proven. *Sitar v. Indiana Department of Transportation,* 344 F.3d 720, 728 (7th Cir. 2003). The circumstances surrounding the firings, including the proximity between the activity and the termination, are important in determining whether there was a causal connection. *Sitar,* 344 F.3d at 728-29. *See also Haywood v. Lucent Technologies, Inc.,* 323 F.3d 524, 533 (7th Cir. 2003).

In the First Amendment context, whether an employee can show that he was retaliated against for exercising his rights is a "fact-specific inquiry." *Gazarkiewicz v. Town of Kingsford Heights,* 359 F.3d 933, 945 (7th Cir. 2004). A plaintiff can meet his burden by "showing that his speech was 'a substantial or motivating factor in his termination.'" *Gazarkiewicz,* 359 F.3d at 946 (citation omitted). If the defendant then shows that it would have fired the plaintiff regardless of his speech, the plaintiff can prevail only if he shows that the defendant's reason was pretextual and that the unlawful reason was the substantial or motivating reason. *Gazarkiewicz,* 359 F.3d at 945-46.

In *Seymore,* one of the two cases that specifically discusses Section 2114, the district court found that the causation requirement could be shown under the "dual motive" analysis outlined by the Supreme Court in *Mount Healthy City School District v. Doyle,* 429 U.S. 274, 285, 97 S.Ct. 568, 575, 50 L.Ed.2d 471 (1977). In that First Amendment retaliation case, the Supreme Court held:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" or to put it in other words, that it

> was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re [-] employment even in the absence of the protected conduct.
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> 429 U.S. at 287, 97 S.Ct. at 576

This is the same test used in subsequent First Amendment retaliation cases but is different from the test used in other discrimination cases. *See generally Gorden v. Neal,* 17 F.3d 925, 927-29 (7th Cir. 1994). In light of the liberal reading of Section 2114, it is unlikely that any court would hold the plaintiffs to the stringent standard used in the First Amendment context. By distilling the remaining factors of the tests outlined above, the appropriate course of action is to consider all of the circumstances surrounding the termination in determining whether there was a causal link between the report to the Coast Guard and the terminations.

There was testimony that the plaintiffs may have been fired because of their refusal to join the SIU and also because they may have been involved in sabotaging the wiring and causing expensive transformers to blow. The testimony of Gourguechon and Heitmeier in these areas was unconvincing as it was based on speculation and conjecture. First, the defendants provided no specific information that any of the plaintiffs intentionally sabotaged the ship. There also was no evidence that any of the plaintiffs were involved in the specific re-wiring problems that led to the blown circuit breakers. The evidence showed that RSI was under a time constraint and that the wiring needed to be done quickly. This

certainly would be consistent with the plaintiffs' testimony that the temporary wiring was done first and that it was not done to code requirements until another shift.

The defendants' testimony also is unbelievable because they offered different justifications for the firings at each stage of the proceedings. From the testimony it appears that the defendants fired the plaintiffs and then came up with the reasoning. None of the plaintiffs was told that he was being fired for sabotaging the vessel because of wiring problems. The issue of sabotage was not raised during the NLRB proceedings where the plaintiffs' firings were discussed. It only was raised for the first time in answers to interrogatories. Gourguechon also gave varying and shifting reasons for terminating, for example Bell, in his NLRB testimony, his testimony during this trial, and during the discovery process. Such *post hoc* rationalizations for an employment decision have not saved an employer in other discrimination cases and should not here.

In addition, while it is clear that the plaintiffs and the defendants had a difference of opinion regarding which union should organize the vessel, this evidence does not outweigh other evidence which showed that the plaintiffs in fact were fired because of their reports to the Coast Guard. Gaffney's termination letter specifically stated that this was the reason. There was no reference to the union activity or sabotage. The letter is direct evidence of retaliation. All of the plaintiffs (except Reilly) were fired in rapid succession and only days after the Coast Guard informed RSI that it was rescinding the COI limited endorsement. Reilly himself was told to find another job during the same time period. While these other termination letters did not include the reason listed in Gaffney's letter, this easily is explained as Gaffney testified that he told the defendants, upon receiving his termination

letter, that they could not fire him for the reason stated. These rapid firings are at least circumstantial evidence that the plaintiffs were terminated because of their report to the Coast Guard. It is more probable than not that these plaintiffs were fired because of their involvement in the report to the Coast Guard than for any of the other reasons that the defendants offered.

The remaining liability question is whether Gourguechon and Heitmeier can be individually liable for their decision to terminate the plaintiffs. Prior to the 2002 amendments, 46 U.S.C. §2114 was limited to the "owner, charterer, managing operator, agent, master, or individual in charge of a vessel." Subsequent to the amendment, all "persons" could be held liable. There is no definition of the various terms listed in the original section of the Code. No case authority defines who may be sued nor do the three cases related to 46 U.S.C. §2114 discuss the liability of individuals, like Gourguechon and Heitmeier, under the statute. 46 U.S.C. §10101(1) and (2) define a master as an "individual having command of a vessel" and an owner as being "the person to whom the vessel belongs." Obviously neither Gourguechon nor Heitmeier were owners, charterers, or masters of the M/V Showboat. However, both Gourguechon and Heitmeier were "individual[s] in charge of a vessel." They both had the ability to hire and fire personnel, and both were involved in the day-to-day operations of the vessel. As such, both of these defendants can be held personally liable for the retaliatory firings. For these reasons, the court finds that RSI, Heitmeier, and Gourguechon did violate Section 2114 when they fired the plaintiffs in retaliation for their report to the Coast Guard concerning a violation of maritime safety laws.

REMEDY

Findings of Fact

Gaffney was first hired by RSI in January 1997. His wages were $388.00 per day. As with some of the other plaintiffs, he worked a 42 day rotation - that is, he worked for 42 days, for which he received his daily pay, then was off for 42 days, for which he received no pay. He received no benefits such as vacation or retirement. He was fired on January 6, 1998. He immediately looked for a new job and eventually was hired by American Ship Management as a Fleet Manager for Patriot Contract Services. Since leaving RSI, Gaffney has made more than what he would have made had he remained with RSI. He missed 14 days of work while looking for a job, and he incurred expenses in the amount of $1,200.00 for breaking his apartment lease and for expenses related to looking for a new job. Gaffney was required to pay a $4,000.00 initiation fee upon taking his new job in order to join the union which represented employees of his new employer.

Goodrich began working for RSI in January 1997. His wages were $289.00 per day, and he worked a similar 42 day rotation. Goodrich received no benefits, and he was fired on January 14, 1998. At the time of his discharge, he had roughly 21 days left on his rotation. Goodrich started a new job on March 2, 1998 with Keystone Shipping Company. Prior to getting the new job, Goodrich walked the picket line in front of the M/V Showboat for a few days. He also went to school for a week-long course in order to get a Tanker Certification. The undisputed evidence revealed that from March 1998 to the date of trial, Goodrich has worked various jobs with pay ranging from $68.00 per day to $325.00 per day.

Anderson was hired on December 20, 1996 at a rate of $289.00 per day with no benefits. He worked a 21 day rotation and was fired six days into that rotation on January 7, 1998. Anderson walked the picket line anywhere from a couple of days to a couple of weeks prior to finding a job, but he was looking for a job during that time. The next job he found, in April 1998, was outside of the sailing business and with a company named Ryerson. Anderson also went to night school to get his MBA and generally has increased his annual salary. In 1998, he made $30,000, in 1999 he earned $27,000, in 2000 he made $47,000, and in 2001 and 2002 he indicated that he made more than what he would have made at RSI.

Bell worked a similar 21 day rotation and was paid a rate of $388.00 per day with no benefits. After he was fired on January 6, 1998, he walked the picket line and then found his next job at the Majestic Star Casino on April 16, 1998. He indicated that he missed 50 to 53 days of work due to the firing. Afterwards, Bell made the same amount as he would have made at RSI from 1998 to 2001. In 2001, Bell indicated that he made $60,000, and there was no indication of how much he made in 2002.

Beardon was hired in November 1996 and worked a 21 day rotation. He was fired on January 6, 1998 after having started his rotation on December 26, 1997. He was paid $289.00 per day with no benefits. After his termination, he walked the picket line for about a week before he attended school for one and a half months and took the Florida State Pilots Exam. He did not get a job until March 9 or 11, 1998. At that time, he was hired by Mormac Shipping Company at a rate of $130.00 plus vacation time. Beardon also has increased his annual salary throughout the years. However, since leaving RSI, he has worked 12 hour days instead of the

eight hour days he worked at RSI. In 1998, he made $58,000 working 12 hour days (which would equal $38,000 if he worked eight hour days); in 1999, he made $67,000 (which converts to $44,689); in 2000, he made $42,000 (which converts to $28,014); in 2001, he made $26,000 (which converts to $17,342); and for 2002, he made $17,000 until trial.

Palmer worked a 42 day rotation and made $289.00 a day with no benefits. He was fired midway through his rotation on January 23, 1998. After walking the picket line, he was able to acquire a new job within a couple of weeks on the Blue Chip Casino boat. Palmer has left the sailing industry and works for a power plant in Holland, Michigan. Palmer has made the same annual salary over the years, $30,000, and is earning less now than what he earned while working on the M/V Showboat.

Trundy also made $289.00 per day with no benefits and was fired with eight days left on his rotation on January 8, 1998. He did not look for a job immediately after he was fired and instead walked the picket line. He eventually found a job in March 1998 through MEBA at the Maritime Overseas Corporation. In 1998 and 1999, he made $180.00 per day and worked 180 days per year ($32,400 per year). From 2000 to trial, he made $220.00 per day for 180 days per year ($39,600 per year).

Finally, Neil Reilly worked a 42 day rotation. It is unclear exactly what Reilly's daily pay rate was, but as a chief engineer, he probably made the same as Gaffney, $388.00 per day. He was not fired after his rotation ended on January 21, 1998, but he sought other employment. Reilly first worked on the M/V Majestic Star on April 1, 1998 and then worked on deep sea boats. He has made the same amount of money as he

made on the M/V Showboat. Reilly did incur job searching expenses.[5]

Conclusions of Law

The applicable version of 46 U.S.C. §2114(b) provides that the court may order any "appropriate relief" including "restraining violations of this section" and reinstatement with back pay. This is an admiralty suit, and there is no reason why general damages rules that would be followed in civil suits would not be applicable here. While the plaintiffs are not required to show their damages with exactitude, the damages must be reasonable, must adequately compensate the plaintiffs for the injury suffered, and must not be based on speculation. The plaintiffs are not seeking reinstatement or other equitable relief. All of the evidence presented related to the plaintiffs' daily wages, the number of days they worked, how soon after the firings they were able to secure employment, and their general income in the years after the firings. Thus, the plaintiffs are seeking back-pay, punitive damages, and attorney fees.

As an initial matter, the defendants only make a brief and general argument that the plaintiffs should not recover any damages because they failed to mitigate their damages and because the evidence of damages was vague. Even though the plaintiffs had the burden of showing damages, the defendants nonetheless had the burden of showing that the plaintiffs failed to mitigate their damages. In this respect, the

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[5] As stated in the Liability portion of this order, neither Horton nor Doncet has shown that he was retaliated against because of the Coast Guard issue. Therefore, they can recover no damages and judgment will be entered against them.

defendants only have shown that most of the plaintiffs walked the picket line for a few days to a few weeks after they were fired and that some plaintiffs were able to secure higher paying jobs. In addition, as noted above, the plaintiffs are not required to show their damages with mathematical precision. Rather, they only are required to provide enough information from which reasonable damages can be calculated.

First, the plaintiffs are seeking back pay. In other areas of the law, the purpose of back pay is to make the plaintiffs whole by compensating them for what they would have earned absent the retaliation. *See generally David v. Caterpillar, Inc.*, 324 F.3d 851, 865-66 (7th Cir. 2003) (Title VII case); *United States Can Company v. National Labor Relations Board*, 254 F.3d 626, 632-33 (7th Cir. 2001) (labor case). The plaintiffs are entitled to receive wages from the time they were fired in January 1998 to the time of trial, August 19, 2002, minus any mitigation in the form of other income. The defendants argue that the plaintiffs who walked the picket line after being terminated should not recover. However, each of the plaintiffs walked the picket line for negligible amounts of time, and there was evidence that at least some of the plaintiffs were actively seeking employment during that time.

The following table represents the yearly pay (daily rate times 180 days per year that they would have worked) each plaintiff would have received had he remained at RSI:

Gaffney	$388.00	X	180	=	$69,840.00
Goodrich	$289.00	X	180	=	$52,020.00
Anderson	$289.00	X	180	=	$52,020.00

Bell	$388.00	X	180	= $69,840.00
Beardon	$289.00	X	180	= $52,020.00
Palmer	$289.00	X	180	= $52,020.00
Trundy	$289.00	X	180	= $52,020.00
Reilly	$388.00	X	180	= $69,840.00

As all of the plaintiffs were able to secure other employment, the amount of income earned from those endeavors must be subtracted. Both Gaffney and Reilly made more money after RSI, so they can recover nothing in back pay. For the remaining plaintiffs, the amount of wages they would have made at RSI minus the actual income they earned from other employment reveals the amount of back pay that RSI is liable for.

The plaintiffs have provided a list of the amount of back pay claimed by each plaintiff. The amounts indicated by the plaintiffs are similar to the amount that the court has calculated. In addition, the plaintiffs also have included expenses that some of the plaintiffs incurred in looking for jobs and other miscellaneous expenses. Thus, the compensatory damages for the plaintiffs are:

Gaffney	$ 10,632.00
Goodrich	$101,505.00
Anderson	$ 52,060.00
Bell	$ 30,564.00

Beardon	$ 97,046.00
Palmer	$102,767.00
Trundy	$ 88,564.00
Reilly	$ 100.00

These amounts have not been challenged by the defendants.

The plaintiffs also are seeking punitive damages in the amount of three times the actual damages. Again, the defendants have not addressed this issue. Section 2114 does not provide for punitive damages nor does it explicitly state that punitive damages are not available. *Miles v. Apex Marine Corporation,* 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), concerned a wrongful death action based on negligence under general maritime law. With respect to the types of damages that the plaintiff could recover, the Supreme Court held that damages must be uniform whether a wrongful death action is brought under general maritime law, the Jones Act, or the Death on High Seas Act. Thus, the plaintiff could not recover for certain non-pecuniary losses under general maritime law that were not recoverable under the statutes. 498 U.S. at 37, 111 S.Ct. at 328. In subsequent decisions, lower courts have found that *Miles* does not prohibit punitive damages entirely under general maritime law, just that it limits those damages where a statute also provides a cause of action. *See CEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 701 (1st Cir. 1995) (in a maritime destruction of property case brought under the general maritime law, the court found that punitive damages were available at the discretion of the trial court because there was no relevant legislation on the matter); *Guevara v. Maritime Overseas Corporation,* 59 F.3d 1496, 1513 (5th Cir. 1995) (finding, in part, that punitive damages

in a maintenance and cure action were not available under general maritime law because the cause of action could be brought under general maritime or the Jones Act, which does not provide for such damages). Some courts have allowed for punitive damages in maritime cases. *See In re Exxon Valdez*, 270 F.3d 1215, 1226 (9th Cir. 2001); *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58, 65 (1st Cir. 2000) (noting in dicta that general maritime law allows for punitive damages "for reckless conduct"); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama on September 22, 1993*, 121 F.3d 1421, 1427-28 (7th Cir. 1997) (stating that punitive damages "upon a showing of intentional or wanton and reckless conduct amounting to a conscious disregard of the rights of others" (citation and quotation marks omitted)). *But see Mullane v. Chambers*, 333 F.3d 322, 334-35 (1st Cir. 2003) (stating that while punitive damages can be granted upon a showing of wanton and reckless conduct, "it is equally true that punitive damages are 'rarely imposed'" *(citing CEH, Inc.*, 70 F.3d at 699)).

None of the cases cited above dealt with Section 2114 or with the type of retaliation at issue here. In other areas of the law, punitive damages are available depending upon the circumstances. For example, under Title VII, a plaintiff may recover punitive damages if "the defendant 'engaged in a discriminatory practice or discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'" *Hildebrandt v. Illinois Department of Natural Resources*, 347 F.3d 1014, 1031 (7th Cir. 2003) *(quoting* 42 U.S.C. §§ 1981a(b)(1) and (3)). *See also Calhoun v. DeTella*, 319 F.3d 936, 942 (7th Cir. 2003) (discussing the same standard in Section 1983 cases); *Tyrus v. Urban Search Management*, 103 F.3d 256, 266 (7th Cir. 1996) (outlining the same standard in Fair Housing Act cases); *Kinslow v. American Postal Workers Union, Chicago*

Local, 222 F.3d 269, 278-79 (7th Cir. 2000) (stating the same standard in a Labor Management Reporting and Disclosure Act case even though there was no explicit statutory authority allowing for punitive damages in such a retaliation case); *Shea v. Galaxie Lumber and Construction Company, Ltd.,* 152 F.3d 729, 734 (7th Cir. 1998) (approving punitive damages award for retaliation under the Fair Labor Standards Act and 29 U.S.C. §216 (b)).

With respect to retaliation claims, however, punitive damages are not always available. *See Kramer v. Banc of America Securities, LLC,* 355 F.3d 961, 965 (7th Cir. 2004) (construing an Americans with Disabilities Act damages claim pursuant to 42 U.S.C. §2000e-5(g)(1) which provided for only equitable relief including back pay). In addition, other areas of the law do not provide for punitive damages. *See Low v. McGraw-Hill Companies, Inc.,* 361 F.3d 335, 343 (7th Cir. 2004) (no punitive damages under the Employment Retirement Income Security Act of 1974); *Franzoni v. Hartmarx Corporation,* 300 F.3d 767, 773 (7th Cir. 2002) (no punitive damages under the Age Discrimination in Employment Act). Where punitive damages are available, there also may be a cap on the amount that a plaintiff can recover. *See* 42 U.S.C. § 1981a(b)(3) (limiting the amount of punitive damages to a maximum of $300,000).

As indicated above, the purpose of Section 2114 is to promote the safety of seagoing vessels. The individuals who are most likely to have knowledge about the safety problems aboard a vessel are the seamen, such as the plaintiffs here. If a defendant is allowed to retaliate against them, not only would the defendant endanger the passengers and crew, but the defendant's actions also may have a chilling effect on the willingness of other seamen to report a violation. There has been no showing that such a chilling effect has occurred in

this case. The evidence did show, however, that RSI acted willfully and wantonly in its dismissal of each of the plaintiffs. After he was fired, Gaffney told Gourguechon that he could not fire him for reporting a safety violation. Instead of reconsidering his decision or taking the time to obtain legal advice, Gourguechon quickly fired the remaining plaintiffs. Gourguechon, however, did remove the offending language from the subsequent termination notices. This supports a finding that the defendants must have believed that there was something seriously wrong in terminating Gaffney and the other plaintiffs. The defendants acted with total indifference to the federally protected rights of these plaintiffs.

Moreover, the defendants have provided only speculative and unsubstantiated reasons for their decision to terminate the plaintiffs' employment. Indeed, Gourguechon provided letters of recommendation to at least three of the plaintiffs. If Gourguechon believed that the plaintiffs were involved in sabotage or improper union activity, it would be unusual for him to provide letters of recommendation.

For these reasons, punitive damages are warranted in this case, but not in the amount that the plaintiffs have requested. The treble damages sought are disproportionate to the type of harm suffered here and would result in a windfall for the plaintiffs, most of whom have suffered no long lasting effects of the termination. Most of the plaintiffs have gone on to better paying jobs and higher certifications since being terminated by RSI. Only Beardon, Palmer, and Trundy appeared to be making less at the time of trial than they did for RSI. There was no showing that even those plaintiffs would have remained at RSI for any extended period of time. There also was no showing of other long-term adverse effects because of the firings except that Gaffney indicated that this

blemish on his employment record may have delayed some security clearances.

Each of the plaintiffs testified that he was not suing for the money but rather to vindicate his rights. As such, punitive damages in the amount of $25,000 is reasonable and appropriate to deter the defendants from future bad conduct. An equal amount for each plaintiff is appropriate because they each experienced the same long-term effects of the termination and because each plaintiff suffered the same deprivation of a statutory right. As such, each plaintiff's damages are:

Gaffney	$ 35,632.00
Goodrich	$126,505.00
Anderson	$ 77,060.00
Bell	$ 55,564.00
Beardon	$122,046.00
Palmer	$127,767.00
Trundy	$113,564.00
Reilly	$ 25,100.00

Finally, the plaintiffs seek an award of attorney fees. The American rule generally holds that each party bears its own cost of representation. *See Maynard v. Nygren,* 332 F.3d 462, 471 (7th Cir. 2003) (in an ADA case, stating "the American Rule is generally that prevailing parties are *not* entitled to fees, even where a full adjudication on the merits has taken

place" (emphasis in original)); *Zeigler Coal Company v. Director, Office of Workers' Compensation Programs, United State Department of Labor,* 326 F.3d 894, 899 (7th Cir. 2003) (in a Black Lung Benefits Act case, stating that each party ordinarily bears its own costs absent "express statutory authorization to the contrary."). *See also Adams v. Unione Mediterranea Di Sicurta,* 2004 WL 624763, *9 (5th Cir. 2004) ("According to the general 'American Rule' applied in admiralty cases, attorney fees are not awarded absent a statutory or contractual authority."); *Madeja v. Olympic Packers, LLC,* 310 F.3d 628, 635 (9th Cir. 2002) ("The equitable grant of attorney's fees is appropriate in admiralty only when the shipowner acted arbitrarily, recalcitrantly, or unreasonably."); *NATCO Limited Partnership v. Moran Towing of Florida, Inc.*, 267 F.3d 1190, 1193 (11th Cir. 2001) (noting that attorney fees generally are not granted in admiralty cases unless there is statutory authority, bad faith by the losing party during litigation, or a contractual agreement).

Again, the defendants have not addressed the award of attorney fees. Allowing the plaintiffs to recover attorney fees here would be similar to allowing them to recover double the punitive damages amount. While the plaintiffs' argument that the defendants acted willfully is persuasive, such an argument only allows for the punitive damages outlined above and not an award of attorney fees. *See generally Johnson v. Kakvand,* 192 F.3d 656, 662 (7th Cir. 1999) ("It is true that an award of attorneys' fees may not be used as a sanction for misconduct."). There has been no showing that the defendants have behaved vexatiously during the course of litigation or that any agreement between the parties requires the award of such fees. Section 2114 itself does not specifically allow for the award of attorney fees. Notwithstanding language in other statutes, and the amendments of Section 2114 that allow for

attorney fees, the version of Section 2114 applicable here allows for remedies that are equitable in nature and not the type of fees that the plaintiffs are requesting.

For the foregoing reasons, the Clerk is ORDERED to enter judgment for the plaintiffs, Michael Gaffney, Thomas Goodridge, Edward Anderson, Thomas Bell, Robert Beardon, Robert Palmer, Thomas Trundy, and Neil Reilly and against the defendants Riverboat Services, Inc., Riverboat Services of Indiana, Inc., Robert Heitmeier, and Thomas A. Gourguechon in the amounts listed below:

Gaffney	$ 35,632.00
Goodrich	$126,505.00
Anderson	$ 77,060.00
Bell	$ 55,564.00
Beardon	$122,046.00
Palmer	$127,767.00
Trundy	$113,564.00
Reilly	$ 25,100.00

The Clerk is further **ORDERED** to enter judgment for the defendants, Riverboat Services, Inc., Riverboat Services of Indiana, Inc., Robert Heitmeier, and Thomas G. Gourguechon and against the plaintiffs, Dean Horton and Adam Doncet.

As this case remains pending with respect to the remaining defendants, the plaintiffs are encouraged to submit dismissal papers for Showboat Marina Casino Partnership, Showboat Indiana, Inc., M/V Showboat, and Showboat Mardi Gras Casino to be approved by the District Court.

ENTERED this 29th day of April, 2004

s/ ANDREW P. RODOVICH
United States Magistrate Judge

No. 06-389

IN THE

Supreme Court of the United States

RIVERBOAT SERVICES OF INDIANA, INC., *et al.*,

Petitioners,

v.

MICHAEL P. GAFFNEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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November 2006

QUESTIONS PRESENTED

1. Whether the Seventh Circuit's conclusion that the plaintiffs were terminated in violation of the seaman's whistleblower statute, 46 U.S.C. § 2114, conflicts with the only other court of appeals decision interpreting the statute, or with interpretations of other whistleblower statutes.

2. Whether the Seventh Circuit's decision conflicts with its own precedent regarding proof of causation in retaliation cases.

3. Whether the Seventh Circuit erred in upholding the district court's punitive damages award under an abuse-of-discretion standard when the constitutionality of the award was never challenged.

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INTRODUCTION

Petitioners Riverboat Services, Inc., Riverboat Services of Indiana, and Thomas Gourguechon (collectively "Riverboat") urge this Court to adopt a radical and untested interpretation of the seaman's whistleblower statute, 46 U.S.C. § 2114, that has never been endorsed by any court examining this or any other analogous whistleblower statute. Riverboat's interpretation of the statute would, for the first time, exclude from protection reports of safety violations solely because the violations were committed by an agency rather than by a private employer. This interpretation would ignore both the plain language and the purpose of the seaman's whistleblower statute and would create an incentive for employees not to report safety violations that put passengers at direct risk of harm.

In addition, Riverboat asks this Court to intervene to correct what it perceives to be the Seventh Circuit's misapplication of its own precedent, and to set aside the district court's award of punitive damages based on an argument never made below. The Seventh Circuit's decision on both these issues, however, was correct under applicable precedent and, in any case, does not present a circuit split or any other issue necessitating review by this Court. For these reasons, the petition should be denied.

STATEMENT OF THE CASE

Michael P. Gaffney and the other plaintiffs in this case are merchant marine officers formerly employed on the *M/V Showboat*, a large gaming vessel operating on Lake Michigan. Pet. App. 4a. The district court found, and the U.S. Court of Appeals for the Seventh Circuit affirmed, that the plaintiffs were fired by Riverboat for reporting a violation of safety regulations to the Coast Guard. App. 2a-3a.

Coast Guard regulations require vessels the size of the *M/V Showboat* to employ only engineers holding unlimited licenses. Pet. App. 6a. Riverboat, however, requested and

obtained a certificate of inspection from the Coast Guard's regional examination center in Toledo, Ohio purporting to allow it to operate with less experienced limited-license engineers. Pet. App. 7a. Concerned about the resulting risks to passenger safety, the plaintiffs wrote several letters to the Coast Guard requesting more information, raising their safety concerns, and seeking to appeal the decision. Pet. App. 7a-10a. In a final letter of October 10, 1997, signed by all but two of the plaintiffs, the plaintiffs warned that "the change in licensing requirement for the engineers on the M/V Showboat [] from Unlimited to Limited has served to potentially and substantially compromise safety standards aboard the vessel." Pet. App. 9a-10a. The plaintiffs explained that an unlimited license was an essential qualification for an engineer on the *M/V Showboat* because of the vessel's large passenger capacity, the difficulty of maneuvering in shallow waters, and the danger of gusting wind. Pet. App. 9a-10a.

The Coast Guard initially rejected the plaintiffs' appeal. Pet. App. 11a. A little more than two months later, however, the Commander of the Coast Guard's Ninth District concluded that the *M/V Showboat*'s certificate of inspection in fact violated mandatory safety regulations and ordered that the certificate be amended to allow only unlimited-licensed engineers. Pet. App. 12a-13a. On the day after the amended certificate was posted on the *M/V Showboat*, Riverboat fired Gaffney, stating in a letter the reason for the termination: "Unauthorized communication and correspondence with regulatory bodies having jurisdiction over the operation of the vessel." Pet. App. 14a. Upon receiving the letter, Gaffney told his supervisor: "You can't fire me for that." Pet. App. 14a. Over the next two-and-a-half weeks, the other plaintiffs were also fired, but, after Gaffney's admonition to his supervisor, the

subsequent termination letters omitted the basis for discharge. Pet. App. 14a-15a.

The plaintiffs then filed suit under 46 U.S.C. § 2114, which forbids retaliation against seamen who report safety violations to the Coast Guard. Pet. App. 16a-17a. After a bench trial, the district court found that all but the two plaintiffs who did not sign the October 10 letter were terminated in retaliation for protected whistleblowing activities and awarded compensatory and punitive damages. Pet. App. 21a-23a. The Seventh Circuit affirmed the district court's judgment but concluded that the record evidence also required a finding that Riverboat was liable to the two plaintiffs who did not sign the October letter. Pet. App. 50a-53a.

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit's Decision Does Not Create a Circuit Split on the Correct Interpretation of the Seaman's Whistleblower Statute or Other Whistleblower Statutes.

Riverboat's first argument for review is that the Seventh Circuit's decision conflicts with the only other court of appeals decision addressing the statute at issue in this case, *Garrie v. James L. Gray, Inc.*, 912 F.2d 808, 810 (5th Cir. 1990), and with the decisions of other courts interpreting different whistleblower statutes. The cases cited by Riverboat, however, involve very different circumstances and are not in any way inconsistent with the Seventh Circuit's decision here.

A. The Seventh Circuit's Decision Is Consistent with the Only Other Court of Appeals Decision to Interpret the Seaman's Whistleblower Statute.

Aside from the decision of the Seventh Circuit below, the only court of appeals decision to analyze the statute at issue in this case is the Fifth Circuit's decision in *Garrie*. *Id.* The plaintiff in *Garrie* called the Coast Guard to ask whether applicable regulations prohibited shifts of longer than twelve hours. *Id.* at 812. He did not, however, give the name of his employer or request that the Coast Guard investigate or take any other action. *Id.* Indeed, he explicitly stated that he did not wish to file a formal complaint. *Id.* After the plaintiff subsequently refused to work more than a twelve-hour shift, his employer fired him. *Id.* at 809-10.

The version of the seaman's whistleblower statute in effect in *Garrie*—the same version at issue here—provided that a seaman is protected from retaliation if he has "in good faith reported . . . to the Coast Guard that the seaman believes that a violation of . . . a regulation . . . has occurred." 46 U.S.C. § 2114 (1984, since amended in 2002). Given that the plaintiff in *Garrie* did not give the Coast Guard any information that would have allowed it to investigate a possible safety hazard, the Fifth Circuit held that the plain language of the statute was not implicated. *Garrie*, 912 F.2d at 812-13. The plaintiff in that case simply had not made a "report" of a safety violation to the Coast Guard.

Riverboat attempts to manufacture a conflict with *Garrie*, arguing that the plaintiffs in this case also did not make a "report" within the meaning of the statute. Petitioners apparently base this contention on the fact that the plaintiffs designated their various letters to the Coast Guard as either

requests for more information or as an appeal of the regional examination center's decision instead of as a formal "report."

The Seventh Circuit, however, saw no conflict with *Garrie* and relied on it heavily in its opinion. Pet. App. 32a-37a. As the Seventh Circuit recognized, nothing in the statute requires a report to be submitted in any designated form or with any particular degree of formality. Pet. App. 34a. Unlike the plaintiff in *Garrie*, the plaintiffs here alleged a specific safety violation and provided sufficient information for the Coast Guard to investigate. Pet. App. 36a-37a. Given that the Coast Guard in fact treated the plaintiffs' complaint as a report and investigated the allegations—indeed, the plaintiffs succeeded in causing the Coast Guard to revoke the amended certificate of inspection—it is nonsensical to argue that the plaintiffs, like the plaintiff in *Garrie*, did not give the Coast Guard sufficient information to remedy the complained-of safety violation.

Moreover, the seaman's whistleblower statute has since been amended to further broaden the protection given to whistleblowers. Although the amended language does not appear to significantly affect its application to this case, the fact that no court of appeals has yet interpreted the amended statute is another reason counseling against the intervention of this Court.[1]

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[1] The previous version of the statute applicable to this case read:

> An owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good

(continued...)

B. The Seventh Circuit's Decision Is Consistent with Other Courts' Interpretations of the Whistleblower Protection Act and Analogous State Statutes.

Lacking any conflict with other cases interpreting the seaman's whistleblower statute, Riverboat looks to decisions interpreting other statutes designed to protect whistleblowers, including the federal Whistleblower Protection Act of 1989 ("WPA"). *See Francisco v. Office of Pers. Mgmt.*, 295 F.3d 1310 (Fed. Cir. 2002); *Meuwissen v. Dep't of Interior*, 234 F.3d 9 (Fed. Cir. 2000). The cases cited by Riverboat suggest that a government employee is not entitled to whistleblower protection when the recipient of the disclosure is already aware of the violation. Thus, under this rule, a federal employee

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[1](...continued)

> faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.

46 U.S.C. § 2114 (1984). The amended version reads:

> A person may not discharge or in any manner discriminate against a seaman because . . . the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred.

46 U.S.C. § 2114.

whistleblower may not be entitled to protection after bringing forth information about a publicly known decision, such as a published agency adjudication. *See, e.g., Francisco*, 295 F.3d at 1314; *Meuwissen*, 234 F.3d at 13. Moreover, because the officials who committed the wrongs are already aware of the violation and are unlikely to take any action to remedy it, these cases hold that "[c]riticism directed to the wrongdoers themselves is not normally viewable as whistleblowing." *Horton v. Dep't of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995).

From these cases, Riverboat attempts to extrapolate the principle that a report of a regulatory violation to an agency is not protected as long as *someone* at the agency is already aware of the violation. None of the cases, however, holds that disclosure to a *higher* authority who is not yet aware of the violation and is capable of taking action against the wrongdoer is not protected by the WPA. To the contrary, "contact[ing] or complain[ing] to a higher authority" is precisely the kind of whistleblowing contemplated by the statute. *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998); *see also Horton*, 66 F.3d at 282 ("The purpose of the [WPA] is to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in disclosure to the press."). In this case, although the regulatory violation reported by the plaintiffs was known to the low-level Coast Guard agents who granted Riverboat's request for the variance, it was known to neither the public nor the higher levels of Coast Guard command. Pet. App. 37a n.23. All the cases cited by Riverboat would require giving protection to the whistleblowers under these circumstances.

Indeed, because the WPA is a statute designed to protect federal employees who complain about *government* wrongdoing, it would have been absurd for courts interpreting the statute to have adopted a position inconsistent with the

Seventh Circuit's decision here. Violations reported under the WPA would *always* have been known to at least two classes of employees at the agency—the wrongdoers themselves and the complaining parties. *See Meuwissen*, 234 F.3d at 13 ("Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred . . . ."). The knowledge of these employees, however, does not mean that the violation is "publicly known" in the sense Riverboat uses that phrase. To hold otherwise would render the WPA entirely powerless to achieve its fundamental objective: protection of government whistleblowers.

The cases cited by Riverboat interpreting the Minnesota whistleblower statute deal with the same problem; in all these cases, the whistleblower reported the information only to the wrongdoer and was held not to have made a "report" within the meaning of the state statute. *See Hitchcock v. FedEx Ground Package Sys., Inc.*, 442 F.3d 1104, 1106 (8th Cir. 2006) (holding that the Minnesota Whistleblower Statute did not protect an employee who reported to her employer only what it already knew); *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 203 (Minn. 2000) (same); *Rothmeier v. Inv. Advisers, Inc.*, 556 N.W. 2d 590, 593 (Minn. Ct. App. 1997) (same). *Cf. Kelly v. Lambda Research, Inc.*, 89 F. App'x 535, 545 (6th Cir. 2004) (holding that the Ohio Whistleblower Law did not protect an employee who had no good-faith belief in wrongdoing). Thus, the holdings in these cases are not in conflict with the decision below. Moreover, even if there were some conflict, the language and purposes of the myriad state whistleblower statutes would not shed any light on the proper interpretation of the federal statute at issue here.

C. The Seventh Circuit's Decision Does Not Conflict with the Third Circuit's Interpretation of the Clean Water Act's Whistleblower Provisions.

Riverboat also cites the Third Circuit's decision in *Passaic Valley Sewerage Commissioners v. U.S. Department of Labor*, 992 F.2d 474, 478 (3d Cir. 1993), for the proposition that a statute designed to protect *privately* employed whistleblowers does not provide any protection for employees who complain about *agency* wrongdoing and that, for this reason, the plaintiff's complaint about the Coast Guard variance is not protected. *Passaic Valley* held nothing of the kind. The question there was whether, under the Clean Water Act's whistleblower protection provisions, a report about corporate wrongdoing made internally within the corporation was protected whistleblowing, or whether the complaint had to be made to a government agency or to the press to be protected. *Id.* at 477-78. The court held that *either* form of complaint was protected, but did not even address the question whether a complaint about agency misconduct would also have been protected from retaliation. *Id.* at 478-80.

In any case, reliance on another statute is inapposite here because the Seventh Circuit's interpretation of the seaman's whistleblower statute is the only one supported by the plain language of the statute. The version of the statute in effect for purposes of this case covers situations where a seaman "believes that a violation of . . . a regulation . . . *has occurred*" (emphasis added) and is not, as Riverboat suggests, limited to violations committed by the *employer*. Moreover, as the Seventh Circuit recognized, to limit the language in the way suggested by Riverboat would seriously undermine the statute's purpose of improving marine safety because it would discourage employees from reporting agency or other third-

party misconduct in cases where, for example, the Coast Guard granted a variance from binding safety regulations because of mistake or collusion and passengers are thereby put at risk. Pet. App. 43a. And, although Riverboat had not yet hired any limited licensed engineers at the time the complaint was made, there is no reason why a seaman should be forced to needlessly endanger the safety of passengers by waiting to report an imminent violation of a safety regulation until the violation has actually occurred. This is especially true where, as here, the defendant was the one who requested an illegal variance to the safety regulation and the variance has already been approved by the Coast Guard.

II. The Seventh Circuit's Decision Does Not Conflict with Its Own Precedent Regarding Proof of Causation in Retaliation Cases.

Riverboat next argues that the Seventh Circuit misapplied its own precedent in affirming the district court's decision. Riverboat cites Seventh Circuit precedent in the employment discrimination context holding that, when a plaintiff seeks to prove retaliation under the *McDonnell Douglas* burden-shifting framework, one element of the plaintiff's burden is to show that no similarly situated employees who did not engage in protected activities were subject to the adverse action.

Even assuming that the Seventh Circuit would import the *McDonnell Douglas* test into the seaman's whistleblower statute—which it has never done—the test would be inapplicable here, where the plaintiffs presented both direct and circumstantial evidence that their terminations were in retaliation for protected activity. *McDonnell Douglas* is designed to provide an alternate framework for plaintiffs who have no actual evidence of discriminatory intent. *See Stone v. City of Indianapolis*, 281 F.3d 640, 643 (7th Cir. 2002). It is

not intended to defeat plaintiffs—such as those here—who *do* have such evidence.[2]

In this case, the district court found powerful direct and circumstantial evidence in favor of the plaintiffs. Pet. App. 21a. Indeed, management's letter of termination to Gaffney—drafted the same day that the amended certificate of inspection was posted—*specifically stated* that the reason for the discharge was his report to the Coast Guard, evidence that the Seventh Circuit characterized as a "smoking gun." Pet. App. 51a. And although later termination letters to the other plaintiffs—all delivered within two weeks of the amended certification—did not explicitly contain the same admission, the district court found that the omission was explained by the fact that, after receiving his letter, Gaffney told management that his termination was illegal. Pet. App. 47a. Moreover, the district court found that Riverboat's alternative explanation for the discharges—that the plaintiffs were engaged in unionizing activities and sabotage—was not supported by any evidence and, given Riverboat's shifting justifications at various stages of the proceedings, "was simply not worthy of belief." Pet. App. 46a-47a.

Even if the Seventh Circuit *had* misapplied its own precedent, it would not be a reason for this Court to grant

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[2] Contrary to Riverboat's assertion, it makes no difference whether the plaintiff's actual evidence is direct or circumstantial in nature. *Rogers v. City of Chicago*, 320 F.3d 748, 753-54 (7th Cir. 2003). As long as the plaintiff produces *either* direct *or* circumstantial evidence sufficient for a trier of fact to find causation, there is no need to engage in the *McDonald Douglas* test. *Id.* Here, the plaintiffs produced both.

review. Riverboat does not argue that the decision creates a circuit split or raises any other issues necessitating this Court's intervention. The Seventh Circuit has already fully considered Riverboat's arguments and concluded that the district court's judgment is consistent with its own case law. Whether the Seventh Circuit correctly applied its precedent is a question for that court, not this one.

III. The Seventh Circuit Did Not Err in Upholding the District Court's Punitive Damages Award Under an Abuse-of-Discretion Standard.

Riverboat's final argument is that the Seventh Circuit erred in applying an abuse-of-discretion standard to the district court's award of punitive damages. As the Seventh Circuit made clear in its opinion, however, Riverboat never argued that the punitive damages award was unconstitutionally excessive. Pet. App. 72a n.39. This Court unambiguously held in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001), that, "[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination under an abuse-of-discretion standard." Because Riverboat failed to preserve its due process argument in the Seventh Circuit, its argument for application of a de novo standard of review in this Court is meritless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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